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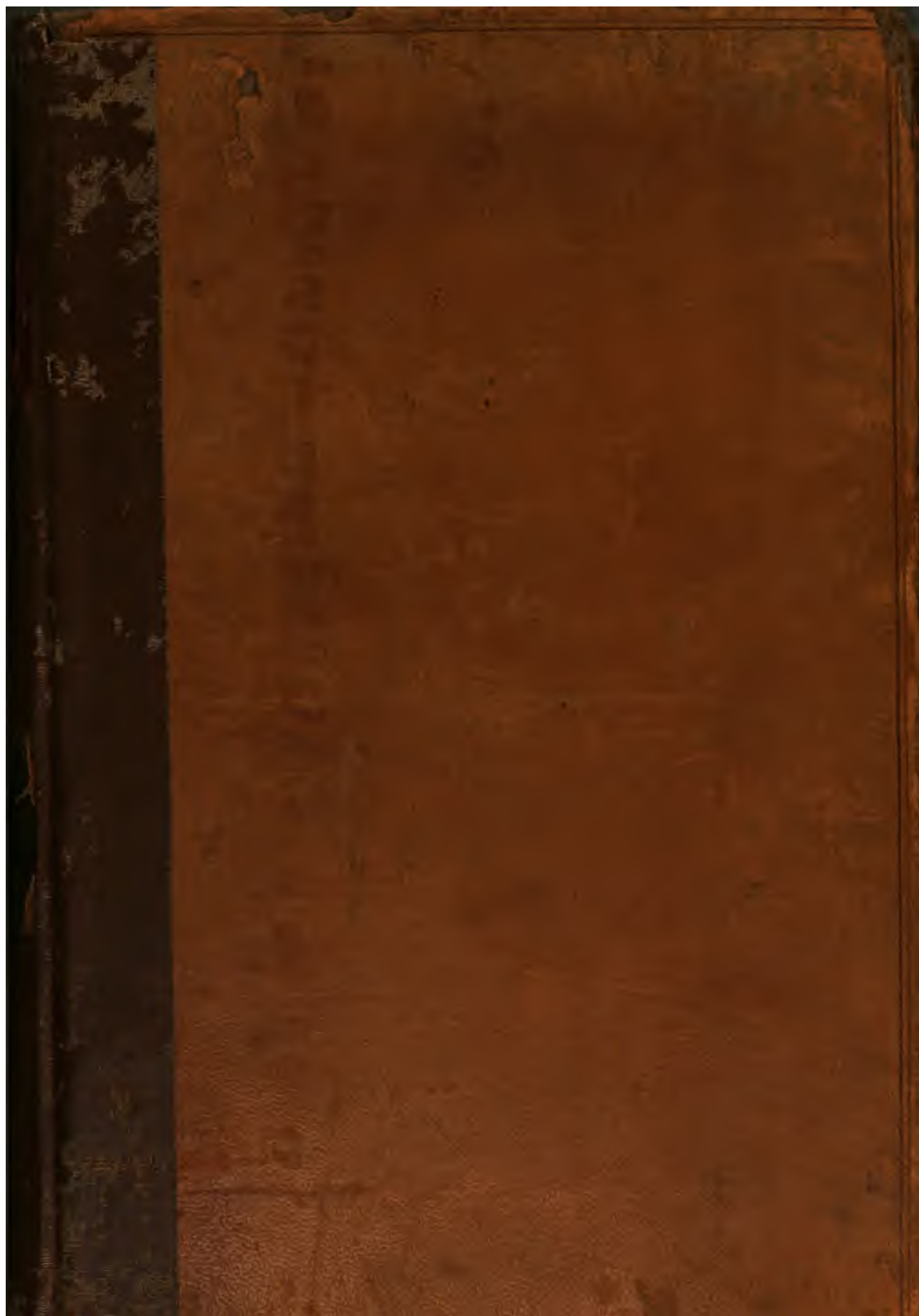
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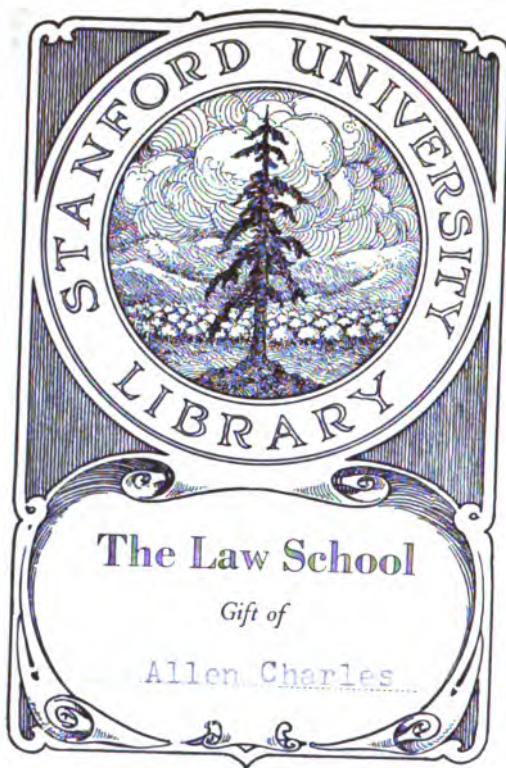
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INSTITUTES  
OF  
COMMON AND STATUTE LAW.

BY  
JOHN B. MINOR, LL. D.,  
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VIRGINIA.

VOLUME IV.  
THE PRACTICE OF THE LAW IN CIVIL CASES,  
INCLUDING THE SUBJECT OF PLEADING.  
IN TWO PARTS—PART II.

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## CHAPTER II.

## OF THE PRINCIPAL RULES OF PLEADING.

THE principal rules of pleading have been classified and expounded by Mr. Stephen with such felicity, that any considerable departure from his plan would be doing an injustice to the student. To that plan, therefore, it is designed to adhere, with such occasional modifications and additions as in the progress of the subject may seem to be called for.

It will be remembered that in the beginning of the discussion of the *pursuit of remedies* through the medium of an *action at common law*, it was proposed first to state the *proceedings in actions* from beginning to end, (*Ante*, p. 698), with the purpose of afterwards setting forth the *principal rules of pleading*, as the second and last step in the exposition of the topic. To that second part we are now come, and will proceed to unfold it as briefly as may be:

2<sup>a</sup>. The Principal Rules of Pleading.

As preliminary to the development in detail of the *rules of pleading*, it will be desirable to consider again the *nature and objects* thereof, to which it will be found that the *rules* have a direct relation. And it may be observed that in the systematic classification of these rules, the student will find great advantage in the familiarity which it is hoped he has acquired with the proceedings in an action as set forth in the preceding chapter. Much that he has there learned will now be brought into requisition, and it will be prudent to recur continually to the explanations which have been there given, not only when they are particularly referred to, but whenever the necessary brevity in this part of the subject shall occasion any obscurity.

As the object of all pleading, or juridical altercation, is to *ascertain the subject for decision*, so the main object of the common law system of pleading is to ascertain it by the *production of an issue*, a question either of fact or law, mutually proposed and accepted by the parties as the subject for determination. This appears to be peculiar to that system, being unknown in the present practice of any other plan of judicature. In all courts indeed, the particular subject for decision must, of course, in some manner be developed before the decision can take place, but the methods generally adopted for this purpose differ widely from that of the common law. (*St. Pl.* 124-'5; *Id.* (Tyler,) 148.)

By the general course of all other judicatures, the parties make their statements *at large*, and with no view to the extrica-

tion of the *precise question* in controversy; and it consequently becomes necessary, before the court can proceed to a decision, for itself, or for some officer, or for the counsel on both sides, to review, collate, and consider the opposite effect of the different statements,—to distinguish and extract the points mutually admitted, and those which, though undisputed, are immaterial; and thus, by throwing off all unnecessary matter, to arrive at length at the required selection of the point to be determined. The common law differs from this method in *obliging the parties to come to issue*; that is, so to plead as to develop some question (or issue) *by the effect of their own allegations*, and *to agree upon this question as the point of decision in the cause*; thus rendering unnecessary any retrospective inspection of the pleadings, for the purpose of ascertaining the matter in controversy. (St. Pl. 125-'6; Id. (Tyler,) 148-'9.)

Mr. Stephen ascribes this peculiarity in common law pleading to three causes; namely:

(1), The practice of *oral pleading* which long prevailed in the English courts; because this method was very much less burdensome to the memory than to retain the whole tenor of the altercation, and to make a retrospective summary of it. (St. Pl. 126; Id. (Tyler,) 149.)

(2), The variety of *modes of decision* prevailing at common law; as questions of law by the court, and questions of fact usually by a jury; but in certain cases in other manners. This variety made it needful to discriminate the *exact point* of the controversy, in order that it might appear which of the modes of decision was to be employed. (St. Pl. 127-'8; Id. (Tyler,) 149-'50; The King v. Cooke, 2 B & Cr. (9 E. C. L.) 871.)

(3), The *general prevalence of jury trial* in respect to questions of fact; for although there are various other modes of deciding questions of fact in particular cases, the trial by jury is incomparably the most highly esteemed by the common law, and the most frequent in practice. But the trial by jury is futile, unless the point or points which the jurors are to try shall be plainly agreed upon and set before them. (St. Pl. 133; Id. (Tyler) 152.) And moreover, the jury consisted anciently of persons who were personally cognizant of the facts, as witnesses thereto; and the issue, therefore, was necessarily characterized by great certainty or particularity, or else the sheriff would have no guide in summoning the jurors.

But whilst the *production of an issue* has been not only the constant effect, but the professed aim and object of common law pleading from the earliest period of the history of the common law, yet it is not the *only object*. The point on which the cause is to turn, as Mr. Stephen shows, must be *material, single, and certain*, and must be arrived at *without obscurity or confusion*, and *with as little of prolixity and delay as possible*. He conceives,

therefore, the *chief objects* of pleading to be these: that the parties be *brought to issue*; that the issue so produced be *material, single, and certain* in its quality; and that there be an avoidance of *obscurity and confusion*, and of *prolixity and delay*. Accordingly, he classifies the *rules of pleading* under these several heads following, corresponding to the *objects of pleading* just stated, viz:

- I. Rules which tend simply to the *production of an issue*.
  - II. Rules which tend to *secure the materiality of the issue*.
  - III. Rules which tend to *produce singleness or unity in the issue*.
  - IV. Rules which tend to *produce certainty or particularity in the issue*.
  - V. Rules which tend to *prevent obscurity and confusion in pleading*.
  - VI. Rules which tend to *prevent prolixity and delay in pleading*.
  - VII. Certain *miscellaneous rules*.
- See St. Pl. 129 & seq; Id. (Tyler) 151 & seq.

#### SECTION i.

##### *Of Rules which tend to the Production of an Issue.*

W. C.

##### 1<sup>b</sup>. Rules which tend to the *Production of an Issue*.

Upon examination of the system of allegations, as already explained in the preceding chapter, whereby the parties are brought to issue, it is found to resolve itself into the following fundamental rules or principles, namely: First, that *after the declaration, the parties must, at each stage, demur, or plead by way of traverse, or by way of confession and avoidance*. Second, that *upon a traverse, issue must be tendered*; and lastly, that *the issue, when well tendered, must be accepted*. It is manifest that, by an adherence to these rules, an issue must, in every case, soon be reached; and these rules, therefore, will form the subject of the present section. (St. Pl. 137; Id. (Tyler) 156.)

W. C.

##### 1<sup>c</sup>. RULE I.—AFTER THE DECLARATION, THE PARTIES MUST AT EACH STAGE DEMUR, OR PLEAD BY WAY OF TRAVERSE, OR BY WAY OF CONFESSION AND AVOIDANCE.

This rule has two branches,—

(1), The party must *demur or plead*. If he does neither, but confesses the right of the adverse party, or says nothing, the court immediately gives judgment for his adversary; in the former case, as by confession; in the latter, by *non-pros*, or *nil dicit*;

(2), If the party *pleads*, it must be either by way of tra-



*verse*, or of *confession* and *avoidance*. If his pleading amount to neither of these modes, it is open to demurrer on that ground. But a third topic must also be discussed in this connexion, namely:

(3), Certain exceptions to the general principle which requires a party either to demur, or to plead as above described;  
W. C.

#### 1<sup>d</sup>. Demurrer.

We are to observe, (1), The nature and properties of a demurrer; (2), The effect of pleading over without a demurrer; and (3), The considerations which determine a pleader's choice to demur or to plead;

W. C.

#### 1<sup>e</sup>. The Nature and Properties of a Demurrer.

The nature and properties of a demurrer will lead us to discuss, (1), The nature of a demurrer; (2), The form of a demurrer; and (3), Its effect;

W. C.

#### 1<sup>f</sup>. The Nature of a Demurrer.

A demurrer proposes to *stay* (*demorari*, Fr. *demorrer*), upon the adversary's pleading, and not to answer its averments, because the case shown by it is essentially insufficient, or because it is stated in an inartificial manner; for the law requires in every pleading two things: the one, that it be in matter sufficient; the other, that it be deduced and expressed according to the form of law; and if either of these be wanting it is cause of demurrer; and it may be observed further, that a violation of any of the rules of pleading to be hereafter stated is in general, ground for demurrer; and such fault occasionally amounts to matter of *substance*, but usually to matter of *form* only. (St. Pl. 139, 44; Id. (Tyler), 157, 82.)

#### 2<sup>f</sup>. The Form of a Demurrer.

Let us take notice of the form of a demurrer, (1), At common law; and (2), By statute;

W. C.

#### 1<sup>g</sup>. Form of a Demurrer at Common Law.

The common law, as we have seen, never requires a demurrer to specify the objection which the demurrant proposes to make, however trifling or formal, save only the objection of *duplicity of allegation*, (1 Chit. Pl. 701; Cuuningham v. Smith, 10 Grat. 257; *Ante*, p. 619, &c.); so that upon a mere general allegation that a pleading is "*not sufficient in law*," the party is at liberty by the common law to insist upon any defect whatever, except *duplicity of averment*, or departure from the *singleness* required.

#### 2<sup>g</sup>. Form of Demurrer since the Statutes 27 Eliz. c. 5, & 4 Anne, c. 16, and the corresponding Virginia statutes.

These two statutes of 27 Eliz., and 4 Anne, by requiring that the court should give judgment according to the *very right of the cause*, without regarding any imperfection, omission, or want of form, except those only which the demurrant shall specially set down and express, together with his demurrer, as causes thereof, first gave rise to the distinction between *general* and *special* demurrer;

W. C.

1<sup>h</sup>. General Demurrer.

Under those statutes of 27 Eliz., and 4 Anne, a general demurrer, (that is, a *demurrer which does not specify the objection* to the pleading), lies for *matter of substance* only; that is, for matter or defect such that, in consequence of it, the court cannot see how to give judgment *according to the very right of the cause*. (St. Pl. 140-141; Id. (Tyler), 158; *Ante*, p. 619, &c.)

And in Virginia, prior to 1850, there was a statute corresponding very accurately in substance to those English statutes; but now, since 1850, it is enacted, that "on a demurrer, (unless it be to a *plea in abatement*), the court shall not regard any defect or imperfection in the declaration or pleadings, whether it has heretofore been deemed mis-pleading, or insufficient pleading, or not, unless there be omitted something so essential to the action or defence *that judgment according to law, and the very right of the cause cannot be given*." And it is added that no demurrer shall be sustained because of the omission in any pleading of the words, "This he is ready to verify," or "This he is ready to verify by the record," or "as appears by the record;" but the opposite party may be excused from answering any pleading which ought to have, but has not, such words therein, until they be inserted. (V. C. 1873, c. 167, § 32; *Ante*, p. 620, &c.)

2<sup>h</sup>. Special Demurrer.

A special demurrer (which *specifies the precise objection meant to be insisted on*), is, as we have seen, the creature of the statutes of 27 Eliz. c. 5, and 4 Anne, c. 16. Those statutes forbade the courts to notice any defect or imperfection in any pleading, *unless it was specially stated*, which was so merely matter of form that it did not prevent the court from seeing how to give judgment *according to law and the very right of the cause*. And such defects are now in Virginia no ground of demurrer *at all*, although they be specified, except as to *pleas in abatement* (*supra*); so that our courts are deprived of all power (save as to *dilatory*

*pleas*,) to preserve the accustomed forms of pleading from troublesome and useless innovations! (*Ante*, p. 620, &c.) Dilatory pleas are still demurrable for defects of form, being regarded with no favor. See *Mantz v. Headley*, 2 H. & M. 314; 1 *Crompton*, 174; *Lloyd v. Williams*, 2 M. & S. 485.

The *form* of a demurrer at common law is verbose and cumbrous (3 Chit. Pl. 1245), and in Virginia has been by statute (in imitation of the Rules of Court of Hil. Term, 1834,) abbreviated to the utmost extent. It is as follows: "The defendant (*or plaintiff*) says that the said declaration (*or other pleading*) is not sufficient in law;" to which the joinder is equally brief: "And the said defendant (*or the said plaintiff*) says that the said declaration (*or other pleading*) is sufficient in law." (V. C. 1873, c. 167, § 3; *Ante*, p. 621, &c.)

### 3<sup>d</sup>. The Effect of Demurrer.

The effect of a demurrer is, (1), That it admits as true all such matters of fact as are sufficiently pleaded; and (2), That upon a demurrer the court will consider the whole record, and give judgment for the party who, on the whole, appears to be entitled to it;

W. C.

#### 1<sup>st</sup>. A Demurrer admits as true all such Matters of Fact as are *Sufficiently Pleaded*.

It is laid down as a general uncontested rule, that a demurrer admits all such matters of fact as are *sufficiently* pleaded, (Bac. Abr. Pleas, &c., (N) 3; Com. Dig. Pleader, (Q. 5); and this rule is a necessary consequence of that which requires *singleness of issue*. The demurrer being thus, by implication, an admission that the facts alleged are true, it submits to the court the only remaining question, whether they in law sustain the case of the party by whom they are brought forward. It will be observed, however, that the rule is laid down with the obvious qualification that the matter of fact be *sufficiently pleaded*; for matters not sufficiently pleaded are not admitted to be true by a demurrer; that is, not sufficiently pleaded so as to be demurrable under the statutory provisions above mentioned. (St. Pl. 143; Bac. Abr. Pleas, &c., (N) 3; *Heard v. Baskerville*, Hob. 233 a; *Hancocke v. Prowd*, 1 Saund. 337 b, n (3).)

In Virginia this rule, though not abolished, is very materially qualified by statute, and also by a rule of practice, to be hereafter mentioned, which latter prevails in England also.

(1), It is provided by statute that, in any action, the *defendant* may *plead* as many several matters, whether

of law or fact, as he *shall think necessary*. (V. C. 1873, c. 167, § 24.)

It will be observed, that this privilege is confined in terms to the *defendant*, and is conceded to him *at one stage only* of the altercation, namely, in making his answer to the plaintiff's declaration; but it permits him to rely at the same time on *matter of law* and *matter of fact*, and does not oblige him, like the corresponding English statute, (4 & 5 Anne, c. 16,) to plead *matters of fact* only at the same time, and to put in such pleas alone as the *court shall approve*. (Waller's Ex'or v. Ellis, &c. 2 Munf. 101; Vaiden, &c. v. Bell, 3 Rand. 448; Furmiss v. Ellis, 2 Brock. 14; Stone & Co. v. Patterson, 6 Call. 71.) But the plaintiff, whilst he may give one answer to each plea, cannot at once *reply and demur*, nor otherwise give several answers to the *same plea*. (Lang v. Lewis, 1 Rand. 277.)

The statute in question, therefore, whilst it repeals *some of the consequences* of the common law doctrine, leaves the *principle* thereof untouched.

It would seem that a plea in bar, and a plea in abatement, might, under this statute, be put in at the same time, if the former plea *were in season*. (Jas. River & Ka. Co. v. Robinson, 16 Grat. 440; *Ante*, p. 614.)

(2), The *practice of the courts*, above alluded to, also modifies the doctrine under consideration, by allowing a demurrer, where the opinion of the court has been expressed to overrule it, to be withdrawn by leave of the court, provided the application is made before the judgment is *consummated* by the close of the term when it is pronounced. (Currie v. Henry, 3 Johns. (N. Y.) 140; Maggort v. Harnsbarger, 8 Leigh, 532.) And we have seen that, even in an appellate court, this privilege of withdrawing a demurrer which has been overruled will be respected, and provision be made for its exercise. (*Ante*, p. 877; Hamtramck v. Selden, 12 Grat. 28.)

It should be noted that, where there is a demurrer and a plea both to the declaration, the demurrer should, as a general rule, be first determined, since, if it be sustained, it renders, or may render the trial of the issue in fact, upon the plea, unnecessary. (Bac. Abr. Pleas, &c. (N) 1; Burdett v. Colman, 13 East. 27, 41, 47; Green v. Dulaney, 2 Munf. 518; Jones v. Stevenson, 5 Munf. 7.) And if the demurrer be overruled, judgment should not be entered thereon until the issue joined upon the plea has been tried and disposed of. (Waller's Ex'ors v. Ellis, 2 Munf. 88.) •

2<sup>d</sup>. On Demurrer the Court will *consider the whole record*, and give judgment for the party who, on the whole, appears to be entitled to it.

Thus, on demurrer to the replication, if the court thinks the replication bad, but perceive a substantial fault in the *plea*, it will give judgment, not for the defendant, but the plaintiff, provided the *declaration* be good; but if the declaration also be bad in substance, then, upon the same principle, judgment would be given for the defendant. (Com. Dig. Pleader, (M. 1), (M. 2), (M. 3); St. Pl. 144; Bonham's Case, 8 Co. 120 b; Smith v. Walker, 1 Wash. 135-'6.)

This rule, however, is subject to the three exceptions following, namely:

(1), If the plaintiff demur to a *plea in abatement*, or to any *dilatory plea*, and the court decide against the plea, it will give judgment of *respondeat ouster* against the defendant, without regard to any defect in the declaration. (St. Pl. 144; Hastrop v. Hastings, 1 Salk. 212.)

(2), Though on the whole record the right may appear to be with the plaintiff, the court will not adjudge in favor of such right unless the plaintiff have himself *put his action on that ground*.

Thus, where, on a covenant to perform an award, and not to prevent the arbitrators from making an award, the plaintiff declared in covenant, and assigned as a breach that the defendant would not pay the sum awarded, and the defendant pleaded that, before the award was made, he *revoked*, by deed, *the authority* of the arbitrators, to which the plaintiff demurred, the court held the plea good, as being a sufficient answer *to the breach alleged*, and, therefore, gave judgment for the defendant; although they also were of opinion that the matter stated in the plea would have entitled the plaintiff to maintain his action, if he had alleged, by way of breach, that the defendant *prevented* the arbitrators from making their award. (St. Pl. 145; Marsh v. Bulteel, 5 B. & Ald. (7 E. C. L.) 507.)

(3), The court, in examining the whole record, in order to adjudge according to the apparent right, will consider only the right in *matter of substance*, and not in respect of *mere form*, such as should have been formerly the subject of special demurrer.

Hence, where the declaration was open to an *objection of form*, such as should (as the law then was) have been brought forward by special demurrer—the plea bad in *substance*—and the defendant demurred to the *replica-*



tion, judgment was given for the plaintiff in respect of the insufficiency of the plea, without regard to the *formal defect* in the declaration. (St. Pl. 145.)

Practically, the rule is to give judgment against him who *made the first mistake* in pleading, as the illustrations stated above show; unless such first mistake has been aided by the adversary *having pleaded over* without demurring. (Roane's Adm'r v. Drummond's Adm'r, 6 Rand. 182; Burnett's Ex'or v. Lloyd, 6 Leigh, 316; Grigg v. Bank of Mount Pleasant, 10 Pet. 264.)

If the declaration contains *several counts*, the defendant should demur to such of them *severally* as are supposed to be bad, as well as to the whole declaration, for if the demurrer be to the whole declaration, and any one count is good, it is obvious that, as an *integral part* of the complaint is sustained, the demurrer to the whole must be overruled. (Hollingsworth v. Milton, 8 Leigh, 50; Henderson v. Stringer, 6 Grat. 133; Smith v. Lloyd, 16 Grat. 309 & seq.)

The same rule applies, and for the same reason, where there is a single count containing several breaches, some *well* and others *ill assigned*, or where there is a single count any otherwise containing a demand of *several matters* which in their own nature are *divisible*, and of which some are *well* and others *ill claimed*. The demurrer in these cases ought to be to the *several breaches*, and to the *several statements* of the distinct claims; for else, if it were only to the *whole declaration*, as a substantive part of the declaration is good, the demurrer cannot be sustained. (Henderson v. Stringer, 6 Grat. 134; Wright v. Michie, 6 Grat. 354; Smith v. Lloyd, 16 Grat. 309 & seq.) On the other hand, where the objection is to a misjoinder of actions, a demurrer to the whole declaration is proper; and if there be such misjoinder, the demurrer must be sustained. (Henderson v. Stringer, 6 Grat. 134.)

2°. The effect of pleading over, without demurrer.

The effect of pleading over, without demurrer, tends often to make faults in pleading, which might have been originally the subject of just exception, unavailable. It is true that, although a demurrer admits the matters of fact sufficiently pleaded to be true, yet it cannot be said *e converso*, that it is the effect of pleading to admit the sufficiency *in law* of the facts adversely alleged. On the contrary, we have lately seen (*Ante*, p. 894) that upon a demurrer arising at a subsequent stage of the pleading, the court will sometimes take into consideration, retrospectively, the sufficiency in law of matters to which an answer

in fact had been given. And in the preceding chapter, it was shown (*Ante*, p. 704 & seq, 770 & seq, 772 & seq, 870 & seq,) that even after an issue in fact, and verdict thereon, the court is bound to give judgment on the whole record, and, therefore, to examine the sufficiency in law of all allegations through the whole series of the pleadings; and accordingly, that advantage may occasionally be taken by either party, of a legal insufficiency in the pleading on the other side, either by motion in arrest of judgment, or motion for judgment *non obstante veredicto*, or motion for a *repleader*, or by writ of error, according to the circumstances of the case. And thus, in some cases, a party, though he has pleaded over without demurring, may nevertheless, afterwards avail himself of an insufficiency in his adversary's pleadings. But this is far from being universally, or at present, even *generally* true. For (1), Faults in pleading are, in some cases, *aided by pleading over*; (2), In other cases, they are *aided by a verdict*; and (3), at certain stages of the cause, all objections, except those of the most radical character, are *cured by the statute of jeofails and amendments*;

W. C.

1<sup>t</sup>. Pleading over without Demurrer *aids some Faults in Pleading.*

Thus, if in an action of covenant the breach of covenant is badly assigned, and the defendant not demurring, pleads *non est factum*, the defective assignment of the breach is aided; for the defendant, by his plea, admits the breach, *if it was his deed*, which is the only thing he controverts. (Com. Dig. Pleader, (C. 85), (E. 37); *Muscot v. Ballet*, 3 Cro. (Jac.) 370; *Anon.* 2 Salk. 219; *Fowle v. Welsh*, 1 B. & Cr. (8 E. C. L.) 29; St. Pl. 147.) And with respect to *all objections of form*, it is laid down by Lord Holt as a general proposition, that "if a man pleads over, he shall never take advantage of any slip committed in the pleadings of the other side, which he could not take advantage of upon a general demurrer." (St. Pl. 147; Bac. Abr. Pleas, &c.; *Anon.* 2 Salk. 519.)

2<sup>t</sup>. Faults in Pleading are in some cases *aided by Verdict.*

Thus, if the grant of a reversion, a rent charge, a right of way, a franchise, or any other hereditament which *lies in grant*, and can be conveyed by deed only, be pleaded, it ought to have been alleged to have been *made by deed*; and if not so alleged, it is ground of demurrer. But if the opposite party, instead of demurring, pleads over, and issue be taken upon the grant, which the jury finds was made, the verdict cures the imperfection in the pleading.

(St. Pl. 148; Stennell v. Hogg, 1 Saund. 228 a, n (1).) In Jackson v. Pesked, 1 M. & Selw. 236, the principle and extent of *aider by verdict* is thus explained: "Where a matter is so essentially necessary to be proved, that had it not been given in evidence the jury could not have given such a verdict, there the want of stating that matter in express terms in a declaration, provided it contains terms sufficiently general to comprehend it in fair and reasonable intendment, will be cured by a verdict; and where a general allegation must, in fair construction, so far require to be restricted that no judge and no jury could have properly treated it in an unrestrained sense, it may be reasonably presumed, after verdict, that it was so restrained at the trial." And so that great authority in matters of pleading, Mr. Sergeant Williams, says, in Stennell v. Hogg, 1 Saund. 228, n (1), "Where there is any defect, imperfection, or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer, yet if the issue joined be such as necessarily required, on the trial, proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given the verdict, such defect, imperfection or omission is cured by the verdict, by the common law;" or in the phrase of Westminster Hall, such defect is *not any jeofail* after verdict! But it is only where such *fair and reasonable intendment* can be applied that a verdict will cure the objection. If a necessary allegation be omitted altogether in the pleading, or if the pleading contain matter adverse to the right of the party by whom it is alleged, and so clearly expressed that no reasonable construction can alter its meaning, a verdict will not aid. After verdict, every thing will be intended which the *averments of the record require to be proved*, but nothing more. (St. Pl. 149; Jackson v. Pesked, 1 M. & S. 238-'9; Nerot v. Wallace, 3 T. R. 25; Barber v. Fox, 2 Saund. 136.)

3<sup>d</sup>. At certain stages of the cause all Objections of Form, and most of substance, are cured by the *Statute of Jeofails* and Amendments.

The effect of the statute of *jeofails*, &c., is to provide that no judgment shall be arrested for certain enumerated irregularities in the proceedings as recorded by the clerk, nor *as to the pleadings*, for "any defect, imperfection, or omission in the pleadings, which could not be regarded on demurrer, or for any other defect, imperfection, or omission which might have been taken advantage of on a demurrer, but was not so taken advantage of." (V.

C. 1873, c. 177, § 3.) For the details of the statute and its effect, see *Ante*, p. 765 & seq.

3°. The Considerations which determine the Pleader's Choice to demur or to plead.

The considerations which determine the pleader's choice to demur or to plead have been already sufficiently set forth, *Ante*, p. 623-'4, to which reference is here made.

See St. Pl. 151; *Id.* (Tyler,) 165; V. C. 1873, c. 181, § 8, 11; Wood's Ex'or v. Garnett, 6 Leigh, 277.

2°. Pleading.

The party having determined to plead, must in the main (with a few exceptions) plead by way of *traverse* (or *denial*) of the adversary's allegations, or by way of *confession and avoidance* thereof. Let us, therefore, advert to (1), Pleading by way of traverse; (2), Pleading by way of confession and avoidance; and (3), The nature and properties of pleading in general;

W. C.

1°. Pleading by way of Traverse.

We are to observe (1), The several kinds of traverse; and (2), The rules applicable to traverses in general;

W. C.

1°. The several Kinds of Traverse.

The several kinds of traverse are (1), The common traverse; (2), The general traverse, or general issue; (3), The special traverse; and (4), The traverse *de injuria*;

W. C.

1°. The Common Traverse.

The *common traverse* is characterized by a direct denial of the adversary's allegation *in the very terms of the allegation itself*. If in an action of covenant, the plaintiff avers that the defendant broke his covenant *by revoking the authority* of arbitrators, the defendant in his plea traverses in the *common form*, by alleging that he *did not revoke* such authority. If the defendant pleads the statute of limitations, averring that the cause of action *did not accrue within — years*, the time prescribed by the statute, the plaintiff in his replication, traverses in *common form*, by averring that *the cause of action did accrue within — years*. Of this kind, several examples occurred in the preceding chapter, as especially in connexion with replications to pleas of the statute of limitations, (*Ante*, p. 670 & seq); and it will be found that where the allegation is affirmative, the traverse, must of course be in the *negative*, and *vice versa*, when the allegation is negative, the traverse is *affirmative*. By way of example, let us take a plea of the *two years'* statute of limitations to actions for *articles charged*

*in a store-account*, (V. C. 1873, c. 146, § 8), which it will be remembered is construed to mean a *retail store-account*, where the promise is *not express*, but merely *implied* from the purchase of the articles, and observe the manner of the replication thereto, by way of common traverse.

### PLEA

#### OF THE TWO YEARS' STATUTE OF LIMITATIONS.

##### *In Assumpsit.*

[*Omitting the title of the court and the rules, &c.*]

And the said defendant, by his attorney, comes and says that the said supposed cause of action in the said declaration mentioned, is *for articles charged in a store-account*, and that the same did not accrue to the said plaintiff at any time *within two years next before the commencement of this suit*. And this said defendant is ready to verify.

To this plea the plaintiff might reply either by denying (*traversing*) that the action was *for articles charged in a store-account* (a replication which would be sustained by showing that it was *not a retail account*, or that there was an *express promise* to pay it), or by denying that two years had elapsed since the accrual of the action.

### REPLICATION,

#### TRAVERSING THAT THE ACTION WAS FOR ARTICLES CHARGED IN A STORE-ACCOUNT.

[*Omitting the title of the court, &c.*]

And the said plaintiff, by his attorney, comes and says that the said cause of action in the said declaration mentioned, is *not for articles charged in a store-account*, in manner and form as the said defendant hath in his said plea alleged. And this he prays may be inquired of by the country.

### REPLICATION,

#### TRAVERSING THAT TWO YEARS HAD ELAPSED SINCE THE ACTION ACCRUED.

And the said plaintiff, by his attorney, comes and says that the said cause of action in the said declaration mentioned, *did accrue within two years next before the commencement of this suit*. And this he prays may be inquired of by the country.

It will be observed that this sort of traverse is always accompanied by what is called a *tender of issue*, which by the plaintiff is as above, "And this *he prays* may be inquired of by the country;" and by the defendant, is "And of this *he puts himself* upon the country;" which discrimination, however, is merely a matter of form, and to interchange the expressions is not error. (St. Pl. 231; *Weltale v. Glover*, 10 Mod. 167.)

#### 2°. The General Traverse, or General Issue.

In most of the usual actions, there is a fixed and appropriate form of plea for traversing the *declaration*, in



cases where the *defendant* means to deny its whole allegations, or the principal fact on which it is founded. This form of plea or traverse has been usually denominated *the general issue* in the particular action; and it appears to have been so called, because the issue that it tenders, involving the whole declaration, or the principal part of it, is of a more general and comprehensive kind than that usually tendered by a common traverse. This kind of traverse occurs only in the plea, and at no subsequent stage of the altercation. From the examples which have been given of it in the preceding chapter *Ante*, p. 633, & seq), the student will perceive, that not only in extent or comprehensiveness, but in point of form also, it differs somewhat from a common traverse; for though like that it *tenders issue*, yet in several instances, it does not contradict *in terms of the allegation traversed*, but in a more general form of expression, as especially in the general issues of *non est factum*, and not guilty. (St. Pl. 155.)

The doctrine touching the general issue in Virginia has been very fully expounded (*Ante*, p. 633, & seq, 640 & seq), and cannot now be repeated. The student should here carefully review that exposition. It must suffice in this place, in order to facilitate such review, to present the bare analysis of the discussion, &c., noting, (1), Why the general issue is so called; (2), The forms of the general issue in various actions; and (3), The proof admitted under the general issue in the several actions; W. C.

1<sup>h</sup>. Why the General Issue is so called.

See *ante*, p. 633; *Supra*; St. Pl. 155; Id. (Tyler), 168.

2<sup>h</sup>. The Forms of the General Issue in Various Actions.

See *Ante*, p. 640, & seq; St. Pl. 156 & seq, 162, n (20); Id. (Tyler), 169-70.

3<sup>h</sup>. The Proof admitted under the General Issue, in the Several Actions; W. C.

1<sup>i</sup>. Proof admitted under the General Issue, *in Actions Generally*.

See *Ante*, p. 634, 640, & seq; St. Pl. 162, n (20); 1 Sand. Pl. & Ev. 106 & seq. 140 & seq, 153 & seq, 344 & seq, 352, 393 & seq, 434 & seq; 2 Sand. Pl. & Ev. 856, 865 & seq; 2 Greenl. Evid. § 5 & seq.

2<sup>i</sup>. Proof admitted under the General Issue, in an Action of *Debt on a Sealed Instrument*, or in an *Action of Covenant*.

See *Ante*, p. 640, 643; 1 Chit. Pl. 518 & seq.

3<sup>i</sup>. Proof admitted under the General Issue, in an Action of *Debt on a Simple Contract*.

See *Ante*, p. 641, & seq; 1 Chit. Pl. 516 & seq.

- 4<sup>l</sup>. Proof admitted under the General Issue, in *Trespass on the case in Assumpsit*.

See *Ante*, p. 644, & seq; 1 Chit. Pl. 511 & seq; 2 Greenl. Ev. § 135 & seq; 2 Stark. Ev. 101 & seq; St. Pl. 162, n (20)

- 5<sup>l</sup>. Proof admitted under the General Issue, in *Trespass on the Case in Tort*.

See *Ante*, p. 646; 1 Chit. Pl. 527 & seq; 2 Greenl. Evid. § 231 & seq; 2 Stark. Ev. 392 & seq; St. Pl. 162, n (20.)

- 6<sup>l</sup>. Proof admitted under the General Issue, in *Trespass vi et armis*.

See *Ante*, p. 647; 1 Chit. Pl. 538 & seq, 546 & seq; 2 Greenl. Ev. § 625; 3 Stark. Ev. 1118 & seq.

The action of ejectment, it will be remembered, is in its nature and origin a personal action of trespass *vi et armis, quare clausum fregit*. Its general issue, therefore, not unnaturally, as in other actions of trespass *vi et armis*, is *not guilty*; and although by our statutes all fictions in ejectment are abolished, yet the general issue is still *not guilty*; under which the same evidence and proceedings are admissible as under the same plea at common law, with a few exceptions. And the defendant may also give in evidence under it whatever would bar a writ of right. (V. C. 1873, c. 131, § 13; *Ante*, p. 695)

Certain equitable defences also are by statute allowed to be made under this general issue, although inadmissible at common law, for which reference is made to V. C. 1873, c. 131, § 20 to 22, and to p. 596-'7, *ante*.

- 3<sup>g</sup>. The Traverse *de injuria*.

The traverse *de injuria sua propria, absque tali causa*, is applicable only by way of *replication*, and only to pleas *in excuse*, (and not by way of *title, interest, commandment, or authority, &c.*) in actions of trespass and trespass on the case. It always *tenders issue*; but, like most of the general issues, differs from the common form of traverse by denying in general and summary terms, not in the words of the allegation traversed, (*Ante*, p. 671-'2; St. Pl. 163; 1 Chit. Pl. 638, &c.)

- 4<sup>g</sup>. The *Special Traverse*, or Traverse with an *absque hoc*.

This, the last species of traverse, has been already adequately explained, (*Ante*, p. 647 & seq.) At present the prominent points connected with it will be presented analytically, leaving the explanations under them respectively to be derived, for the most part, from the

passage just cited, and from Mr. Stephen's exquisite exposition of the subject.

Let us take notice of (1), The nature and form of a special traverse; (2), The objects of a special traverse; and (3), The principles regulating pleading by way of special traverse;

W. C.

1<sup>h</sup>. The Form and Nature of a Special Traverse.

Let us observe, (1), The parts of which special traverse consists; and (2), The proper conclusion thereof.

1<sup>h</sup>. The parts of which a Special Traverse consists.

In the former discussion of the subject we saw that a special traverse consists (besides the conclusion) of two parts, namely: (1), The inducement; (2), The *absque hoc*;

W. C.

1<sup>h</sup>. The *Inducement*.

The inducement is the *affirmative* part of the special traverse, and contains the explanation of the circumstances under which the subsequent categorical denial or traverse is made. By the introduction of this qualifying and explanatory matter, the various objects are attained which are presently to be mentioned. Thus, under the influence of such explanatory averments, matters may appear to be traversable which otherwise the party would be estopped to deny; secondly, the copiousness of the explanatory statement may, and probably will, develop any latent question of law, and so oblige the adversary either *to demur*, and so admit the facts, or *to plead to the facts*, and so admit the law; and thirdly, the affirmative averments contained in the inducement will give the party so pleading the affirmative of the issue, and, therefore, (in England) the commencement and conclusion of the cause. (*Ante*, p. 647-8; St. Pl. 166, 177 & seq.)

2<sup>h</sup>. The *Absque hoc*.

The *absque hoc* is the *negative* or traversing part of the special traverse, following upon the inducement, with the barbarous phrase, *without this*, which introduces the traverse or denial of the adversary's allegation, of which the inducement contains only an *indirect*, or as it is called in pleading, an *argumentative* denial. By a rule, which will be considered in its proper place hereafter, all argumentative pleading is prohibited; and hence, to avoid this fault of *argumentativeness*, the inducement is followed up

by the categorical denial under the *absque hoc*. (*Ante*, p. 648; St. Pl. 179.)

2<sup>a</sup>. The *Conclusion* of a Special Traverse.

The conclusion of a special traverse is to be considered as it is, (1), At common law; and (2), By statute.

W. C.

1<sup>k</sup>. Conclusion at *Common Law*.

At common law the conclusion of a special traverse, like that of all pleadings containing *new matter*, is with verification, and *this he is ready to verify*. (St. Pl. 181-'2, 233; 1 Saund. 103 a, n (3).) And thus the issue is postponed one stage, which occasioned the special traverse to be viewed with disfavor by the courts, as a dilatory method, and led at length to the change contained in the Rules of Court of Hilary Term, 1834, providing that its conclusion should thereafter be to *the country*. (St. Pl. 181-'2.)

2<sup>k</sup>. Conclusion by *Statute in Virginia*.

The statute, adopted from the Rules of Court of Hilary Term, 1834, enacts that all special traverses, or traverses with an *inducement* of affirmative matter, shall *conclude to the country*. But this regulation shall not preclude the opposite party from pleading over to the inducement when the traverse is immaterial. (V. C. 1873, c. 167, § 27; *Ante*, p. 617.)

2<sup>h</sup>. The *Objects* of a Special Traverse.

The objects of a special traverse may be enumerated thus, namely, (1), To evade some positive rule of law which forbids a direct or unexplained denial; (2), To separate questions of law from questions of fact by more definite and detailed averments; and (3), To get the affirmative of the issue, and thus obtain the opening and conclusion of the cause;

W. C.

1<sup>l</sup>. To *evade some positive Rule of Law* which forbids a direct or *unexplained Denial*.

This use of the special traverse is sufficiently explained and illustrated, *Ante*, p. 648. See St. Pl. 166 & seq, 176.

2<sup>l</sup>. To *separate questions of Law from questions of Fact*, by more definite and detailed averments.

This second instance of the employment of the special traverse is also explained and illustrated, *Ante* p. 648-'9. See St. Pl. 177-'8.

Another illustration may be added to that at page 648, namely, the case of a bond executed by one on the day *preceding the twenty-first anniversary of his birth*.

To an action on such a bond, the defendant may be supposed to plead *infancy*. Supposing the only question to be as to the infancy, the most obvious replication would be by *way of traverse*, namely, that *defendant was not an infant*; but that would submit to the jury, not only the fact as to when the bond was really executed, but also the subtle law question, whether, if executed the day before the twenty-first anniversary of defendant's birth, he was then under age or not. (1 Insts. Com. & Stat. Law, 472.) If the plaintiff was desirous to plead so as to take this law question from the jury, and bring it before the court, he would resort to the special traverse, setting forth in the *inducement* a particular averment that the bond was executed on the day before the twenty-first anniversary of defendant's birth, and following that with a direct traverse of the fact of infancy under the *absque hoc*—"without this that the said defendant was then an infant."

- 3<sup>1</sup>. To get the affirmative of the Issue, and thus to obtain the opening and conclusion of the argument before the jury.

An excellent illustration of this use of the special traverse is afforded by the case of Cross Keys Bridge Co. v. Rawlings, 3 Bing. N. C. (32 E. C. L.) 71, which is stated at large, *Ante*, p. 649, and to that passage reference is made without repeating; the student, however, being asked to remember that the advantage of thus opening and concluding the cause would not be gained in Virginia by the defendant in any case where the plaintiff had any thing to prove, although it were only damages. (*Ante*, p. 649-'50.)

- 3<sup>b</sup>. The Principles regulating Pleading by way of Special Traverse; W. C.

- 1<sup>1</sup>. The Inducement should of itself amount to a *sufficient, although an indirect, answer* to the adversary's pleading.

See St. Pl. 183-'4; Id. (Tyler,) 195 & seq; Com. Dig. Pleader, (G. 20); Foster v. Crabb, 12 Com. B. (74 E. C. L.) 395 & seq; Smith v. Lovell, 10 Com. B. (70 E. C. L.) 22, 23.

- 2<sup>1</sup>. The *Inducement* must not contain a *direct Denial* of the Adversary's Pleading.

See St. Pl. 184-'5; Id. (Tyler,) 196-'7.

- 3<sup>1</sup>. The Inducement must not be *by way of Confession and Avoidance* of the Adversary's Allegation.

See St. Pl. 184-'5; Id. (Tyler,) 197.

- 4<sup>1</sup>. The Inducement must *not be traversed* by the Adversary, for that would be a *traverse on a traverse*.

See St. Pl. 186-'7; Id. (Tyler), 197-'8.

- 5<sup>1</sup>. The Inducement must not be pleaded to by way of *Confession and Avoidance*.

See St. Pl. 188; Id. (Tyler), 199.

- 6<sup>1</sup>. The Adversary may *Demur* to the whole Special Traverse, for any Insufficiency in the Inducement.

See St. Pl. 188; Id. (Tyler), 199.

- 7<sup>1</sup>. The *Only Way* in which the Adversary can answer a good Special Traverse, is by *Accepting the Issue which it tenders*.

See St. Pl. 189; Id. (Tyler), 199; V. C. 1873, c. 167, § 27.

The special traverse is often called by text-writers *formal traverse*, and sometimes simply *traverse*. The best explanation is that given by Mr. Stephen; but as it may be sometimes needful to consult other elementary writers, reference is made to 1 Chit. Pl. 653; 1 Tidd's Pract. 684, 685, n (a); Gould's Pleading, c. vii, § 6, &c.; Tyrwhitt's Mod. Pl. 102; 1 Saund. 103 a, note.

Among the later cases where the special traverse has been employed, the following may be cited: Cross Key's Bridge Co. v. Rawlings, 3 Bing. N. C. (32 E. C. L., A. D. 1836), 71; Craven v. Saunderson, 4 Ad. & El. (31 E. C. L., A. D. 1836), 666; Gough v. Bryan, 2 M. & Wels. (1837), 770; Harrington & al. v. Bishop of Litchfield, 4 Bing. N. C. (33 E. C. L., A. D. 1837), 77; Pearson v. Rogers, 9 Ad. & El. (36 E. C. L., A. D. 1838), 303; Wilson v. Craven, 8 M. & Welsb. (1841), 593.

- 2<sup>1</sup>. The Rules applicable to *Traverses in General*.

The rules applicable to traverses in general may be stated as follows, viz: (1), A traverse puts the adversary to prove his allegations in manner and form as they are made; (2), A traverse must not be taken on matter of law, unless it be mixed with fact; (3), A traverse must not be taken on matter not alleged, unless it be necessarily implied; and (4), A party to a deed can traverse its contents no otherwise than by the plea of *non est factum*;

W. C.

- 1<sup>2</sup>. A Traverse puts the Adversary to prove his Allegations in *Manner and Form* as he makes them.

It is the nature of a traverse to deny the adversary's allegation *in manner and form* as it is made; and, therefore, to put the opposite party to prove it to be true *in manner and form*, as well as in general effect. And hence, as we have seen, the pleader is often exposed at

the trial, to the danger of a *variance* for a deviation in his evidence from his allegation. The doctrine of *variance*, as well as the modes whereby advantage may be taken of a *variance*, and the very liberal allowance of amendments of the pleading so as to obviate the difficulty, has been already adequately explained. (*Ante*, p. 731, & seq; See St. Pl. 190.)

2<sup>d</sup>. A Traverse must not be taken on *Matter of Law*, unless it be *mixed with fact*.

A denial of the law involved in the preceding pleading is within the scope and proper province of a *demurrer*, and not of a *traverse*. Thus, where in an action on a covenant, whereby defendant agreed that he had not done, nor permitted to be done, any act to charge or incumber an estate, the plaintiff assigned as a breach the execution of a certain conveyance by the defendant, whereby the estate was incumbered, to which the defendant pleaded that he had indeed executed the conveyance referred to, but traversed that the *estate was thereby incumbered*, it was held to be a bad traverse, for that the effect of the conveyance is *matter of law*, and, therefore, not traversable. (*Hobson v. Middleton*, 6 B. & Cr. (13 E. C. L.). 295, 297; *Richardson v. Mayor, &c., of Oxford*, 2 H. Bl. 186; Com. Dig. Pleader, (G. 5).) Upon the same principle, viz: that matter in law shall not be put in issue, to be tried by the country, (for the rule is, as Lord Coke says, *quod quisque novit in hoc se exerceat*), if a matter be alleged in pleading "by reason whereof" (*virtute cujus*), a certain legal inference is drawn—as that plaintiff was "seised in fee," or the defendant "became liable," no traverse to the *virtute cujus* is allowable, for the conclusion imported by it is a *conclusion of law*. (*Priddle & Napper's Case*, 11 Co. 10 b, & n (B); *Beal v. Simpson*, 1 Ld. Raym. 410; *King v. Mayor of York*, 5 T. R. 70.) If it be intended to question the facts from which the seisin or liability is deduced, the *traverse* should be applied to the facts, and to them only; and if the legal inference be doubted, the course is to *demur*. (St. Pl. 192.)

But where an allegation is *mixed of law and fact*, it may be traversed. For example, in answer to an allegation that a man was "taken out of prison by virtue of a certain writ of *habeas corpus*," it may be traversed that he was taken out of prison "by virtue of that writ." (St. Pl. 192-'3; *Beal v. Simpson*, 1 Ld. Raym. 413; *Foster v. Jackson*, Hob. 54 c; 1 Saund. 23, & n (5); *Grocer's Co. v. Archbishop of Cant.* 2 W. Bl. 776; S.

C. 3 Wils. 234); Lucas v. Nockells 4 Bingh. (15 E. C. L.), 729.)

3<sup>d</sup>. A traverse must not be taken on *Matter not Alleged*; unless it be *necessarily implied*.

This rule is recognized by numerous authorities, (Com. Dig. Pleader, (G. 8); 1 Chit. Pl. 644; 1 Saund. 312 d, & n (4); 1 St. Pl. 193; Powers v. Cook, 1 Ld. Raym. 64; S. C. 1 Salk. 298; Tuller v. Cook, 1 Salk, 297; Gilbert v. Parker, 2 Salk. 629; Rex v. Jordan, Cas. Temp. Hardw. 255); and is so obviously reasonable that it is needful only to submit an illustration or two of its application. Thus, in Powers v. Cook, 3 Ld. Raym. 64, (cited *supra*), an action of debt on a bond having been brought by P. against C., as *executrix* of J. S., deceased, C. pleaded in abatement that she was *administratrix*, and *not executrix* of J. S., to which P. demurred, because he said C. ought to have traversed that she meddled as executrix *de son tort* (as of her own wrong), with the estate of J. S. before she became administratrix. But the court held that it was not necessary so to traverse. And Lord Holt said that if C. had taken such traverse, it would have made her plea vicious, for it would have been to traverse what *was not alleged* in the plaintiff's declaration, which would be against a rule of law, that a man shall never traverse that which his adversary has not alleged. So in trespass for cutting down trees, if the defendant says that the bailiff appointed the *taking of trees* for repairs, for which he took those trees, traverse that the bailiff *did not* appoint the *trees which were taken*, is bad, for *that was not alleged*. (Com. Dig. Pleader, (G. 8).)

The qualification to the rule, namely, that a traverse may be taken upon matter which, though not expressly alleged, is *necessarily implied*, is not less established than the rule itself. (St. Pl. 195; Com. Dig. Pleader, (G. 3); 1 Chit. Pl. 644; 1 Saund. 312 d, n (4); 2 Do. 10, n (14); Gilbert v. Parker, 2 Salk. 629.) Thus the allegation that "A is *seised* of a close," implies that he was *sole-seised*, and therefore it may be answered that B was seised of a *third part*, or that A and B were jointly seised, with a traverse that A *alone* was seised. (1 Chit. Pl. 644; Gilbert v. Parker, 2 Salk. 629; Jefferson v. Morton, 2 Saund. 10, & n (14).)

This rule being not of substance but of form only, a violation of it can be taken advantage of only by *special demurrer*, and, therefore, in Virginia, cannot be taken advantage of at all. (1 Chit. Pl. 644; 1 Saund. 312 d, n (4); V. C. 1873, c. 167, § 32.)



4<sup>5</sup>. A Party to a Deed can Traverse its Contents no other-wise than by a Plea of *Non est Factum*.

This rule depends upon the doctrine of *estoppel*; which is where one is precluded in law from alleging or denying a fact in consequence of his own previous act, allegation, or denial to the contrary. Such estoppel may arise either (1), From *matter of record*; (2), From *the deed* of the party; or (3), From *matter in pais*, that is, *matter of fact*. Thus, any confession or admission made in pleading in a court of record, whether it be express, or implied from pleading over without a traverse, will preclude the party from afterwards contesting the same fact in the same (or indeed in any other) suit. (Com. Dig. Estoppel, (A. 1); St. Pl. 197, 217-'18; Downman v. Downman, 2 Call. 507; Fairfax v. Muse, 4 Munf. 124; Eppes v. Smith, 4 Munf. 466; Preston's Case, Gilm. 235; Dupuy v. Southgates, 11 Leigh, 92; Jones v. Myrick, 8 Grat. 179; Cook v. Hays, 9 Grat. 143; Vaughn's Case, 17 Grat. 386; Calwell's Case, Id. 391; Lee Co. Justices v. Fulkerson, 21 Grat. 182; Vooght v. Winch, 2 B. & Ald. (4\* E. C. L.) 668 & seq.) This is an estoppel by *matter of record*. An instance of an estoppel *by deed* is where a bond or other instrument under seal recites a certain fact as the basis, or a part of the stipulation contained therein: the obligor is estopped from afterwards denying the fact so recited. (Taylor v. King, 6 Munf. 358; Wynn v. Harman, 5 Grat. 157; Griffin v. Macaulay, 7 Grat. 476; Emerick v. Tavener, 9 Grat. 220; Cox v. Thomas, 9 Grat. 312; Cordle v. Burch, 10 Grat. 480; Franklin v. Depriest, 13 Grat. 257; Monteith v. Com'th, 15 Grat. 170; Gibson v. Beckham, 16 Grat. 321; Supervisors v. Dunn, 27 Grat. 608; Bower v. McCormick, 23 Grat. 310; Bonner v. Wilkinson, 5 B. & Ald. (7 E. C. L.) 682; Baker v. Dewey, 1 B. & Cr. (8 E. C. L.) 704; Com. Dig. Estoppel, (A. 2); 1 Greenl. Ev. § 22 & seq.; 2 Insts. Com. & Stat. Law, 588.) An example of an estoppel by *matter in pais*, occurs where one man has accepted rent of another. He will be estopped from afterwards denying, in any action with that person, that he was at the time of such acceptance, his tenant. (Com. Dig. Estoppel, (A. 3); 3 Th. Co. Lit. 430-'31.) See Davis v. Thomas, 5 Leigh, 1; Bolling v. Mayor of Petersburg, 3 Rand. 576; Feazle v. Dillard, 5 Leigh, 35-'6; Pettit v. Jennings, 2 Rob. 685, &c., 704; Phelps v. Seely, 22 Grat. 584.)

From this doctrine of estoppel, the rule under consideration seems to have proceeded, (which it will be

observed applies as well to estoppels *of record* and by other *matter in pais*, as by deed.) For though a party against whom a deed is alleged is not estopped to say that the deed is not his,—*non est factum*,—he is precluded by the doctrine in question from denying its effect or operation, as that he did not lease or did not grant, or did not promise, contrary to the tenor of his own deed. But as estoppels do not hold with strangers, there is nothing to preclude *them* from controverting the effect of the most solemn instruments. (St. Pl. 197-8; Com. Dig. Estoppel, (C); 3 Th. Co. Lit. 430 & seq; Taylor v. Needham, 2 Taunt. 278.)

2<sup>e</sup>. Pleadings by way of *Confession and Avoidance*.

We may advert to, (1), The division proper to be made of *pleas* by way of confession and avoidance; (2), The form of such pleadings; and (3), The quality of such pleadings;

W. C.

1<sup>st</sup>. Division of *Pleas* by way of *Confession and Avoidance*.

*Pleas* by way of confession and avoidance, that is, the *defendant's answer* to the declaration, are, (1), *Pleas* in justification or excuse; and (2), *Pleas* in discharge of the action;

W. C.

1<sup>st</sup>. *Pleas* in Justification or Excuse.

The effect of *pleas* in *justification or excuse* is to show that the plaintiff never had any right of action, because the act charged was lawful. Of this character is the plea of *son assault demesne* (*Ante*, p. 672), and the plea of justification filed by the church-warden in the case of *Hawe v. Planner*, being number two of the illustrations of pleading (*Ante*, p. 558).

2<sup>nd</sup>. *Pleas* in Discharge.

The effect of *pleas* in *discharge* is to show that though the plaintiff had once a right of action, it is discharged or released by some matter subsequent, such as a release, payment, set-off, statute of limitations, &c. (*Ante*, p. 655, 666, 668, 669.)

2<sup>d</sup>. The *Form* of Pleadings by way of *Confession and Avoidance*.

With respect to the *form* of pleadings by way of confession and avoidance, it must suffice to refer the student to the examples given in the preceding chapter, and cited in the last paragraph preceding (*Ante*, p. 652, 666, 668, 669); and to observe that they always conclude *with a verification*, because they state *new matter*. (*Ante*, p. 653, 639; St. Pl. 199.)

### 3<sup>d</sup>. The *Quality* of Pleadings by way of Confession and Avoidance.

It is of the essence of pleadings by way of confession and avoidance, impliedly to confess the truth of the allegation which they propose to avoid, not indeed absolutely and to all purposes, but yet so far as to *give color*, as it is called, that is, an apparent or *prima facie* right to the adversary. (St. Pl. 200 & seq; 1 Chit. Pl. 557 & seq; *Ante*, p. 650, &c.)

The *color* which must characterize all pleadings by way of confession and avoidance, is either, (1), Implied; or (2), Express;  
W. C.

#### 1<sup>st</sup>. Implied Color.

*Implied color*, as we formerly said, is that which is inherent in all pleadings which are *properly* by way of confession and avoidance. Thus payment, infancy, release, duress, accord and satisfaction, the statute of limitations, &c., all acknowledge, by necessary implication, the adversary's averment which they seek to avoid. (*Ante*, p. 650; 1 Chit. Pl. 559 & seq; St. Pl. 203, &c.)

#### 2<sup>nd</sup>. Express Color.

*Express color*, it will be remembered, is matter *feigned by the defendant* in his *plea*, in the actions of *assize*, *trespass*, and *trespass on the case*, imputing to the plaintiff a fictitious title, which on its face is *voidable*, but is sufficient to give him a *colorable right* of possession, the object being to enable the defendant to plead by way of *confession and avoidance* his own true title. (St. Pl. 206 & seq; Bac. Abr. *Trespass*, (I) 4; *Ante*, p. 650; 1 Chit. Pl. 560 & seq.)

The alternative mode of pleading, which is also the most direct and obvious, is by *way of traverse*. It will assist the comprehension to contrast the two modes of setting out the defendant's case, by placing them side by side in parallel columns, which will moreover have the effect of illustrating the explanation of the same subject, *Ante*, p. 650-'51.

#### *By way of Traverse.*

*Plf.* Deft. broke my close to my damage \$1,000.

*Deft.* Not guilty, and issue tendered.

*Plf.* Issue joined.

#### *By Confession and Avoidance with Express Color.*

*Plf.* Deft. broke my close, to my damage \$1,000.

*Deft.* One Z was seised of the close in question, and before the alleged trespass, by conveyance duly executed, transferred the land to Y in fee,

from whom it lawfully descended to the defendant as his son and heir. And the plaintiff claiming the said close by color of a *parol demise* for his life, by the said Z, made to him long before the conveyance aforesaid by Z to Y, entered on the premises, and was possessed of the same; and the defendant afterwards entered upon the plaintiff's possession as lawfully he might, and that is the trespass complained of.

*Plf.* Deft. is *not son and heir* to Y, and issue tendered.

*Deft.* Issue accepted.

By pleading thus by way of confession and avoidance, the plaintiff gains these several advantages :

(1), He *spreads his title on the record*, and obliges the plaintiff, if he regards it as not a lawful title as thus exhibited, to *demur* and present the question to the court, instead of its going mixed with all the facts *to the jury*, as it must have done upon the plea by way of traverse;

(2), It obliges the plaintiff to traverse but *one of the degrees or steps* in defendant's title; and by the rules of pleading to *admit all the rest*;

(3), It gives in England the *opening and conclusion* of the discussion to the defendant, because he has the affirmative of the issue. In Virginia, it could seldom, if ever, have that effect in the only actions to which express color is applicable, the plaintiff having generally, if not always, to prove damages, at least in those actions; and according to our practice, the plaintiff having always the opening and conclusion, if he has anything, even damages, to prove. (*Ante*, p. 649-'50.)

The plaintiff, in his replication, is not allowed to traverse the fictitious matter suggested by way of color, not only for the reason stated by Mr. Stephen, (St. Pl. 212), namely, that as the only object of the fiction is to prevent a difficulty of *form*, such a traverse would be foreign to the real merits of the cause, and would only serve to frustrate a useful device, which the courts have long persistently maintained, but for the further technical reason, that if he should traverse the fiction, he would *admit the defendant's title*. (St. Pl. 217.)

Let us advert to, (1), The form of giving express color;

(2), The objects of express color; (3), In what actions the giving of express color is applicable; and (4), What color may be suggested ;

W. C.

1<sup>b</sup>. The Form of giving Express Color.

The form of giving express color is very well illustrated, *ante*, p. 910. See also St. Pl. 207 & seq, 213-'14.

2<sup>b</sup>. The Objects of Express Color.

The objects of express color have been just above stated, (*Supra*, p. 911), and may also be found *Ante*, 650-'51. See St. Pl. 209, &c.

3<sup>b</sup>. In what Actions the giving of Color is Applicable.

Authorities are not wanting which confine the practice of giving express color to the real actions of assize, and writ of entry, and the personal action of trespass, (St. Pl. 213; 3 Reeves' Hist. Eng. Law. 438); but a number of cases, ancient as well as modern, ascertain that express color is used in trespass on the case, as well as in trespass, writ of entry, and assize. Thus, express color was allowed in trespass on the case *in trover*, in *Rockwood v. Frazer*, 1 Cro. (Eliz.) 262; *Wade v. Blunt*, do. 146; *Kynnersley v. Barnard*, 2 Cro. (Eliz.) 554; *Holter v. Bush*, 1 Salk, 394; *Moran v. Sign*, 2 Mees. & W. 95; *Ashton v. Brevitt*, 14 M. & W. 105; *Acraman v. Cooper*, 10 M. & W. 585.

4<sup>b</sup>. What Color may be Suggested.

Originally, various suggestions of apparent right might have been adopted, according to the fancy of the pleader; and although the same latitude is, perhaps, still allowable, yet in practice, it is unusual to resort to any except certain known fictions which long usage has applied to the particular case. Thus, in trespass to land, the color universally given until the enactment of the statute of *grants*, (V. C. 1873, c. 112, § 4), was that of a *charter of demise* of a *freehold estate*, without *livery of seisin*, which operated to pass nothing. Since the statute of *grants* such a charter would operate as a *grant*, to pass the estate mentioned in it, and is therefore no longer fit for the purpose. But a *parol demise* for a freehold estate, or for a term exceeding five years, would, under our statute of conveyances, pass nothing, (V. C. 1873, c. 112, § 1); and would, therefore, be well adapted to take the place in the fiction, of the *charter of demise*.

In trespass, and trespass on the case for taking goods, the usual color is, that the defendant delivered the goods to a stranger, who delivered them to the plaintiff,

from whom the defendant took them. (St. Pl. 213-'14; Morant v. Sign, 2 Mees. & W. 95.)

The qualities which ought to characterize the form of giving color are stated in detail in 1 Chit. Pl. 562-'3.

### 3°. The Nature and Properties of *Pleading in General*.

The nature and properties of pleading in general, without reference to the quality as being by way of traverse, or of confession and avoidance, may be ranged under the two heads, that (1), Every pleading must answer the whole of the adversary's allegations; and (2), Every pleading admits such traversable matter alleged by the adversary as it does not traverse;

W. C.

#### 1°. Every Pleading must answer the *whole of the Adversary's Allegations*, or as much as it professes to answer.

If a plea *proposes* to answer the *whole action*, and really answers but a part, it is demurrable. (Hunt's Ad'mr v. Martin's Ad'mr, 8 Grat. 578.) And if, with a proper commencement, proposing to answer so much only as it actually does answer, it then answers only a part, the plaintiff should *take judgment* as by default, for the part unanswered; and if he fails to do so, the *whole action is discontinued*. And although at the next term of the court the discontinuance may be set aside, yet the cause cannot be heard at such next term without the defendant's consent, but at his instance must be continued. (Southall's Adm'r v. Exchange Bank, 12 Grat. 314-'15; *Ante*, 654, &c.; St. Pl. 216-'17.)

#### 2°. Every Pleading is understood to *admit such traversable matter* alleged by the adversary, as it does not traverse.

This doctrine, reasonable enough if restrained within reasonable limits, we have met with before, and have had occasion to observe the very awkward way in which its effects have been obviated, (*Ante*, p. 616-'17); effects not so much due to the doctrine itself, as to the irrational and needless extent to which it was carried. It is manifest that the rule requiring singleness of issue, and therefore singleness of averment, would be vain, if the pleader were not understood to admit constructively, for the *purposes of the pending action*, such of his adversary's averments as he does not deny; but it is difficult to discern what consideration of policy, justice, or reason demands that he should admit such matters absolutely, and *for all purposes*, in future actions as well as in the one then in progress.

Furthermore, the expedient resorted to, (of *protestation*), explained *Ante*, p. 616, is as lame and imperfect as the

principle itself is irrational and arbitrary. By the use of the *protestation*, the pleader did indeed "*exclude the conclusion*" that the matters not traversed were true, and were admitted by him, provided he *succeeded on the issue which he actually joined*; but if on that issue he was so unfortunate as to miscarry, his protestation went for nothing, and he was *absolutely concluded* as to all those matters, in all future actions, and for all time to come!

It might have been hoped that the judges of England, when framing their "Rules of Court of Hilary Term, 1834," with full power from parliament to deal with the subject; and that afterwards when, in 1849, our own legislature, armed with plenary and independent authority in the premises, came to revise the work of the English judges, the doctrine would have been put upon a footing of good sense. Yet the English rule of court, and our own statute adopted from them, merely say that "no party shall be *prejudiced by omitting a protestation* in any pleading." (V. C. 1873, c. 167, § 26.) The pleader is excused from making protestation (which is conferring a very small boon), but he is still in as bad a plight as if he had made it, should the issue be decided against him!

It would seem that the reform should have gone to the root of the mischief, and provided that passing by any traversable matter alleged by the adversary, without traversing it, should be understood to admit it *so far only as concerns that suit*.

See 1 Chit. Pl. 649; Philips' Case, 19 Grat. 510.

- 3<sup>d</sup>. Exceptions to the Principle which requires a Party (if he does *not demur*) to *plead* by way of *Traverse*, or by way of *Confession and Avoidance*.

These exceptions embrace the cases of (1), Dilatory pleas; (2), Pleadings in estoppel; (3), New assignments; and (4), Where a mere traverse is not sufficient; W. C.

- 1<sup>o</sup>. In case of *Dilatory Pleas*, but *not of answers thereto*.

Dilatory pleas oppose merely a matter of form to the declaration, (as will abundantly appear by recurring to the description of the nature, and to the forms of such pleas in the preceding chapter, (*Ante*, p. 624 & seq), and do not tend either to deny or confess its allegations. But replications and subsequent pleadings following on dilatory pleas, are not within the exception. (St. Pl. 219.)

- 2<sup>o</sup>. In Case of *Pleadings in Estoppel*.

Pleadings in estoppel neither confess nor deny the matter of fact adversely alleged, but rely merely on some matter of *estoppel*, (the nature of which has been considered,

*Ante* p. 908,) as a ground for excluding the opposite party from the allegation of the fact. Like other pleadings, they have a formal *commencement and conclusion* to mark their special character and quality, and to distinguish them from pleadings in bar. (St. Pl. 219-'20; 1 Chit. Pl. 502, 634 & seq.) Such pleadings seldom occur in a *plea* or answer to a declaration, but more frequently in replications and subsequent pleadings; and the matter must be *pleaded in estoppel*, or else cannot operate as such. (1 Chit. Pl. 502, & n (C); Vooght v. Winch, 2 B. & Ald. (4\* E. C. L.) 668 & seq; Hooper v. Hooper, McClelland & Younge, 513; Davis v. Thomas, 5 Leigh, 1.) The following replication will exemplify this manner of pleading:

#### REPLICATION IN ESTOPPEL.

[*Omitting title of court and rules.*] And the said plaintiff says that the said defendant *ought not to be admitted or received to plead the plea* by him above pleaded, because he says that [*state the previous act, allegation, or denial of the opposite party upon which the estoppel is supposed to arise, and then conclude thus*]: and this the said plaintiff is ready to verify. Wherefore he prays judgment if the said defendant *ought to be admitted or received to his said plea*, against the said record, [*or against his own acknowledgment by his deed aforesaid; or against, &c., as the case may be.*] (St. Pl. 220; 3 Chit. Pl. 1143-'44; Took v. Glascock, 1 Saund. 257; Plummer v. Woodburne, 4 B. & Cr. (10 E. C. L.) 625.)

#### 3°. In Case of *New Assignments*.

It has been seen that declarations are frequently conceived in very general terms; a quality which they derive from their adherence to the tenor of those simple and abstract *formulae*, the original writs by which all suits were in ancient times commenced. The effect of this is, that in some cases the defendant is not sufficiently guided by the declaration to the real cause of complaint, and is therefore led to apply his plea to a different matter from that which the plaintiff has in view. A *new assignment* is a method of pleading to which the plaintiff in such cases is obliged to resort by way of *replication*, or more properly of a *new declaration*, for the purpose of setting the defendant right. Thus the plaintiff may have been *twice assaulted* by the defendant, once *justifiably*, because in self-defence, but the other time without legal excuse. Supposing the plaintiff to bring his action for the *latter*, the declaration will be couched in terms so general as not to indicate to which of the two assaults it relates, as is apparent from the form annexed. (St. Pl. 38; 2 Chit. Pl. 846, 850; 1 Chit. Pl. 659, &c.):

#### DECLARATION FOR AN ASSAULT, &c.

[*Omitting title of court and rules.*]

C. O. complains of D. D. of a plea of trespass, for this, to wit: That the said de-



fendant heretofore, to wit, on the — day of —, in the year of our Lord, —, with force and arms, made an assault upon the said plaintiff, and beat, wounded, and ill-treated him, so that his life was despaired of, and other wrongs to the said plaintiff did, against the peace of the Commonwealth, and to the damage of the said plaintiff of \$—, and therefore he brings his *suite*.

The defendant may therefore suppose, or affect to suppose, that the *first* is the assault intended, (the day alleged in the declaration for the commission of the assault being not material to be proved,) and will plead *son assault demesne*, as follows (St. Pl. 163; 3 Chit. Pl. 1067, &c.):

#### PLEA OF SON ASSAULT DEMESNE.

[*Omitting title of court and rules.*]

And for a further plea in this behalf [the general issue of *not guilty* usually preceding the plea of *son assault*, &c.], the said defendant says that the said plaintiff, just before the said time when, &c., to wit, on the day and year aforesaid, with force and arms, made an assault upon him, the said defendant, and would then and there have beaten and ill-treated the said defendant, if he had not immediately defended himself against the said plaintiff; wherefore the said defendant did then and there defend himself against the said plaintiff, as he lawfully might, for the cause aforesaid; and in so doing did necessarily and unavoidably a little beat, wound, and ill-treat the said plaintiff; doing no unnecessary damage to the said plaintiff on the occasion aforesaid. And so the said defendant says, that if any hurt or damage then and there happened to the said plaintiff, the same was occasioned by the said assault so made by the said plaintiff, on him the said defendant, and in the necessary defence of himself, the said defendant, against the said plaintiff: which are the supposed trespasses in the introductory part of this plea mentioned, and whereof the said plaintiff hath above complained. And this the said defendant is ready to verify.

This plea the plaintiff cannot safely *traverse*, because as an assault was in fact committed by the defendant, under the circumstances of excuse here alleged, the defendant would have a right, under the issue joined upon such traverse, to prove those circumstances, and to presume that such assault, and no other, is the cause of action. And it is evidently *reasonable* that he should have this right; for if the plaintiff were, at the trial of the issue, to be allowed to set up a different assault, the defendant might suffer by a mistake into which he had been led by the generality of the plaintiff's declaration. The plaintiff, therefore, in the case supposed, not being able safely to traverse, and having no ground either for demurrer, or for pleading in confession and avoidance, has no course but by a new pleading to correct the mistake occasioned by the generality of the declaration, and to declare that he brought his action, not for the *first*, but for the *second* assault; and this is called a *new assignment*. He may, to be sure, guard himself by

anticipation against the necessity, in the particular case supposed, by charging the defendant in the declaration with *both the assaults*, which (in the form of different counts) is allowable; and if both assaults are thus charged, the defendant must of course answer both in his plea, and the reason for the new assignment then fails. The form of the new assignment in the instance under consideration would be as follows; (St. Pl. 221 & seq, & n (S); 3 Chit. Pl. 1213):

#### REPLICATION BY WAY OF NEW ASSIGNMENT,

*To the foregoing plea of son assault demesne.*

[*Omitting title of court and rules.*]

And the said plaintiff says that he brought this action, not for the trespasses in the said second plea acknowledged to have been done, but for that the said defendant heretofore, to wit, on the — day of —, in the year of our Lord —, with force and arms, upon another and different occasion, and for another and different purpose than in the second plea mentioned, made another and different assault upon the said plaintiff than the assault in the said second plea mentioned, and then and there beat, wounded, and ill-treated him in manner and form as the said plaintiff hath above thereof complained; which said trespasses above newly assigned are other and different trespasses than the said trespass in the said second plea acknowledged to have been done. And this the said plaintiff is ready to verify.

The mistake being thus set right by the new assignment, it remains for the defendant to plead such matter as he may have in answer to the assault last mentioned, the first being now out of the question.

By way of further example may be mentioned a case that arises in trespass *quare clausum fregit*, and was formerly of frequent occurrence. In this action, if the plaintiff declares for breaking his close in a certain county, without naming or otherwise describing the close, if the defendant happen to have *any* freehold land in the same county, he may be supposed to mistake the close in question for his own, and may, therefore, plead what is called *the common bar*, viz: that the close in which the trespass was committed is his own freehold, which yet he is not bound particularly to describe. And then, upon the principle already explained, it will be necessary for the plaintiff to *new assign*, alleging that he brought his action in respect of a different close from that claimed by the defendant as his freehold. (St. Pl. 223; 3 Chit. Pl. 1216; Bac. Abr. Trespass, (I), 2; Thoroughgood's Case, 2 Co. 6 a, n (D); Baldwin's Case, Id. 18 b; 1 Saund. 299 & seq, n (6); Martin v. Kesterton, 2 W. Bl 1089; Hawke v. Bacon, 2 Taunt. 156; Tribble v. Frame, 7 Monr. (Ky.) 530.)

The plaintiff, in this case also, may obviate the necessity

for a new assignment by describing his close by name, or by *abuttals*, or boundaries, so as to identify it reasonably; and if he describe it by name, he may at the trial prove a trespass done to any close in his possession of that name in the county, notwithstanding the defendant may have in the county a close bearing the same name. (3 Chit. Pl. 1216 & n (i); Bac. Abr. Trespass, (I), 2; Corker v. Crompton, 1 B. & Cr. (8 E. C. L.) 48; Richards v. Peake, 2 B. & Cr. (9 E. C. L.) 918.)

The examples of new assignment thus far given consist of cases where the defendant in his plea *wholly* mistakes the subject of complaint. But it may also happen that the plea correctly applies to *part* of the injuries, while owing to a misapprehension occasioned by the generality of the statement in the declaration, it fails to cover the whole. Thus in trespass *quare clausum fregit* for repeated trespasses, the declaration usually states that the defendant, on divers days and times before the commencement of the suit, broke and entered the plaintiff's close, and trod down the soil, &c. without setting forth more specifically in what parts of the close or on what occasions the defendant trespassed. Now the case may be that the defendant claims a right of way over a certain part of the close, and in exercise of that right has repeatedly entered and walked over it; but has also entered and trod down the soil, &c. on other occasions and in parts out of the supposed line of way; and the plaintiff not admitting the right claimed, may have intended to point his action both to the one set of trespasses and to the other. But from the generality of the declaration the defendant is entitled to suppose that it refers only to his entering and walking in the line of way. He may, therefore, in his plea allege, as a complete answer to the whole complaint, that he has a right of way by grant, &c. over the said close; and if he does this, and the plaintiff confines himself in his replication to a traverse of that plea, and the defendant at the trial proves a right of way as alleged, the plaintiff would be precluded (upon the principle already explained,) from giving evidence of any trespasses committed out of the line or track in which the defendant should thus appear entitled to pass. His course of pleading therefore, in such a case, is both to traverse the plea and also to new assign, by alleging that he brought his action not only for those trespasses supposed by the defendant, but for others also committed on other occasions, and in other parts of the close out of the supposed way, which is usually called a new assignment *extra viam*; or if he means to admit the right of way, he may new assign

simply, without the traverse. (St. Pl. 324-'5 & seq; 9 Wentw. Pl. 323, 396.)

As the object of a new assignment is to correct a mistake occasioned by the generality of the *declaration*, it always occurs in answer to a plea, and is, therefore, in the nature of a *replication*, or perhaps it would be more accurate to say of a *new declaration*. It is not used in any other part of the pleading, because the statements subsequent to the declaration are not in their nature such, when properly framed, as to give rise to the kind of mistake which requires to be corrected by a new assignment.

A new assignment is most likely to occur in an action of *trespass*; but it may take place in all actions wherein the form of the declaration, by its generality, makes the reason of the practice equally applicable. Thus, in an action *on the case*, for the publication of a libel, without naming the person to whom the publication was made, if the defendant pleads that he published it lawfully, as to members of a committee of the legislature, whereas the complaint designed is of a publication to other persons, the plaintiff ought to new assign, stating such illegal publication. So, in an action of *assumpsit* for goods sold, &c., where the defendant pleaded a judgment recovered, and the plaintiff has in point of fact obtained a judgment in a former action for goods sold, &c., but for different causes of action, the plaintiff ought not to reply *nul tiel record*; for in such case he would be defeated by the production of the record, which he could neither controvert nor explain; but he should reply that the action is brought for different promises from those causes of action for which the former judgment was recovered. (1 Chit. Pl. 672; 3 Chit. Pl. 1213; St. Pl. 227, n (22).)

Several new assignments may occur in the course of the same series of pleadings. Thus, in the first of the foregoing examples, if it be supposed that *three* different assaults had been committed, two of which were justifiable, the defendant might plead to the declaration as above explained, and then, by way of plea to the new assignment, he might again justify in the same manner another assault, upon which it would become necessary for the plaintiff to new-assign a third time, and this upon the same principle by which the first new assignment was required. (St. Pl. 227.)

A new assignment is, as we have seen, sometimes said to be in the nature of a replication, or more properly of a *new declaration*; that is, a repetition of the declaration, with a more particular detail of the circumstances of the cause of action, so as to clear up the mistake into which

the defendant in his plea has fallen, or pretended to fall. It is therefore to be framed with as much *certainty* or specification of the new circumstances as the declaration itself. Indeed, it should be a little more particular, in order to avoid the necessity of *another* new assignment. Thus, where in an action of trespass *quare clausum fregit*, the plaintiff has omitted to name his close, or to describe it, and is obliged consequently to new assign, the defendant pleading the *common bar*, he is required in his new assignment adequately to describe his close, either by name or boundaries,—abuttals as they are often called. (St. Pl. 227-'8; 1 Chit. Pl. 673; Com. Dig. Pleader, (3 M. 34); Bac. Abr. Trespass, (I) 2; 1 Saund. 299 c, n (6); *Helvis v. Lambe*, 2 Salk. 453.)

The new assignment, it will be observed, impliedly admits the justification or defence set forth in the defendant's plea, and operates therefore as an entire waiver or abandonment of that particular wrong, to which the plaintiff cannot again recur. And the new assignment must not be *negatively*, that the cause of action mentioned in the plea is *not the same* as that for which the plaintiff complains; but *affirmatively*, that there are other and different causes of action to which the complaint refers. (1 Chit. Pl. 663, 673; 3 Do. 12, 13 & seq.)

4°. In case where a *mere Traverse* is not *Sufficient*.

It is implied in the rule, the exceptions to which are under discussion, that as the proceeding must either be by demurrer, traverse, or confession and avoidance, so *any* of these forms of opposition to the last pleading, is, in itself, *sufficient*.

There is, however, an exception to this in a *class of cases* which, we are told, is anomalous and solitary, in which it is not sufficient merely to traverse the adversary's pleading, but in order to give to the issue that *certainty and definiteness* which the rules of pleading require, some additional particulars must be set forth. Thus, in an action of debt on a bond conditioned *to perform an award*, if the defendant pleads "*no award made*," and the plaintiff, in his replication, avers that "*an award was made*," (which being a traverse of the plea, would, according to the rule, be sufficient), he must also proceed to state a *breach of the award*, and without stating such breach, the replication is bad. For, if the plaintiff should confine himself to a mere traverse of the defendant's averment of *no award*, the issue in terms would be, whether or not *there was an award*; whereas the proper development of the merits of the cause requires that the further fact should be inquired into, whether the award *had been violated*. But if the issue

upon the mere traverse, embraces that inquiry at all, it does so very obscurely and vaguely; and so the plaintiff, in order to impart to his pleading the necessary certainty, must supplement his traverse by alleging *a breach of the award*. And so again, if to an action of debt on a bond conditioned to perform *a multiplicity of stipulations*, the defendant pleads (as in such case in order to avoid undue prolixity he may), "*conditions performed*," in general terms, it is not enough for the plaintiff merely to traverse the averment with "*conditions not performed*," but he must proceed also to show in detail the various particulars wherein the defendant has *failed to comply* with the terms of the condition; and if this were not required and observed, there would result an issue so vague and indefinite as not a little to embarrass the trial of the cause. Several instances of this exceptional mode of pleading are mentioned by Mr. Stephen in connexion with the quality of *certainty*. (St. Pl. 233-'4, 336-'7); and will be hereafter explained more copiously.

2°. RULE II. UPON A TRAVERSE, ISSUE MUST BE TENDERED.

In the account formerly given of traverses, it was shown that the different forms thereof all involve a *tender of issue*. (*Ante*, p. 640 & seq); and the rule under consideration prescribes this as a necessary incident to them, and establishes it as a general principle, that wherever a traverse or denial of a fact occurs in pleading, issue ought at the same time to be tendered as to the fact denied, for the end of the altercation is reached. (St. Pl. 230.)

The *formulae* of tendering an issue in fact vary, of course, according to the mode of trial proposed. Let us, therefore, notice (1), The *formulae* of tendering an issue to be tried by a jury; (2), By the record; (3), By certificate or witnesses; and (4), By wager of law; and finally observe, (5), The general rule touching the tender of issue. And the student should keep in mind that (2) and (3) are not fitly described as *modes of trial*, but should rather be denominated *modes of proof*;  
W. C.

1<sup>a</sup>. Tender of Issue to be Tried by a Jury.

The tender of an issue to be tried by a jury is by a *formula* called the *conclusion to the country*, which, it will be remembered, varies according as it is tendered, (1), By the plaintiff; and (2), By the defendant;

W. C.

1°. Tender of Issue to be tried by a Jury, on the part of the Plaintiff.

The *formula* is as follows: "And this the said plaintiff *prays* may be inquired of *by the country*." (1 Chit. Pl. 678; 3 Chit. Pl. 1145; *Ante*, p. 670-'71.)

2<sup>o</sup>. Tender of Issue to be tried by a Jury, *on the part of the Defendant.*

The *formula* manifests submission indeed, to the appointed arbitrament, but no eagerness, such as is exhibited by the plaintiff's *praying* for an inquiry. It is, "And of this the said defendant *puts himself on the country.*" (1 Chit. Pl. 589; 3 Do. 907; *Ante*, p. 640 & seq.) But let it be observed, that the use of one of those *formulae* for the other is not error of which any advantage can be taken, even by special demurrer. (*Jeffries v. Dee*, 1 Lev. 281; *Weltale v. Glover*, 10 Mod. 168.)

2<sup>d</sup>. Tender of Issue to be tried *by the Record.*

As to the *contents* of a record there can be no dispute. The record speaks for itself, and in the absence of fraud in the making of it up, is conclusive of what is found in it. If, however, when a record is vouched, the adversary conceives that it does not warrant what has been deduced from it, he may affirm that there is *no such record (nul tiel record)*, thus tendering an issue which the court is to try upon an inspection of the record, which is very inaccurately styled a *trial by the record*.

The manner of it will best be understood by an example of a plea of a former judgment recovered, vouching the record (that is, tendering an issue to be tried by it), and a replication of *nul tiel record*. (*St. Pl.* 231; 3 Chit. Pl. 299.)

PLEA OF JUDGMENT RECOVERED,

*In Assumpsit.*

[*Omitting the title of the court and the rules.*]

And the said defendant, by his attorney, says, that the said plaintiff, heretofore, to wit, on the — day of —, in the year of our Lord —, in the circuit court, then holden for the county of A., impleaded the said defendant in a certain plea of trespass on the case on promises, to the damage of the said plaintiff of \$—, for the not performing the very same identical promises and undertakings, and each and every of them in the said declaration mentioned; and such proceedings were thereupon had in the said court in that plea, that afterwards, to wit, on the — day of —, in the year of our Lord —, the said plaintiff, by the consideration and judgment of the said court, recovered in the said plea, against the said defendant — dollars, for his damages which he had sustained, as well on occasion of the not performing of the same identical promises and undertakings in the said declaration mentioned, as for his costs and charges by him about his suit in that behalf expended, whereof the said defendant was convicted, as by the record and proceedings thereof, still remaining in the said court, more fully appears; which said judgment still remains in full force and effect, in no wise reversed, satisfied, or made void. And this the said defendant is *ready to verify by the said record*.

REPLICATION.

[*Omitting the title of the court, &c.*]

And the said plaintiff says, that there is *not any record* of the said supposed recovery in the said plea mentioned, remaining in the said court, in manner and form

as the said defendant hath above in his said plea alleged; and this the said plaintiff is ready to verify, when, where, and in such manner as the court here *shall order, direct, or appoint*. [And this replication is followed continuously, by an entry to the effect that "because the court here will advise itself upon the inspection and examination of the said record, by the said defendant in his said plea alleged, a day is given to the parties aforesaid before the court here, until the — day of — next, [or until the next term of this court,] to hear the judgment of the court thereupon, for that the court here is not yet advised thereof, &c.] (St. Pl. 232; 3 Chit. Pl. 1157.)

3<sup>d</sup>. Tender of an Issue to be tried by *Certificate*, or by *Witnesses*.

The tender of an issue to be decided by *certificate*, or by *witnesses* (the trial in both cases being really *by the court*, upon inspection of the certificate, or by hearing the witnesses), is according to the following formula: "And this the said plaintiff" (or defendant) "is ready to verify, *when, where, and in such manner as the court here shall order, direct, or appoint*." (St. Pl. 232-3.)

4<sup>d</sup>. Tender of Issue, to be tried by Wager of Law.

This mode of trial was abolished in England in 1834, by Stat. 3 & 4 Wm. IV, c. 42, and is believed, if it ever had any practical existence in Virginia, to have been done away with by Art. 11 of the Bill of Rights, adopted in 1776, and now constituting § 13, Art. I of the present constitution, which provides, that in controversies respecting property, and in suits between man and man, the trial by jury is preferable to any other, and ought to be held sacred. In *Barry v. Robinson*, 1 Bos. & P. (N. R.) 293, (1805), its effect was in England practically acknowledged, and in *King v. Williams*, 2 B. & Cr. (9 E. C. L.) 538, in 1824, it was admitted, with marks of not a little disgust, to be still an existing mode of trial, although upon the defendant's moving the court to assign the number of compurgators, with whom the defendant should come to perfect his law, the books leaving it doubtful whether it should be *six* or *eleven*, the court declined to give any aid in the matter, saying that the defendant must determine for himself, and at his own peril, what was the proper number, and come provided accordingly. Whereupon, says the reporter, the defendant prepared to bring *eleven*, and the *plaintiff abandoned his action*, probably renewing his suit in the form of *assumpsit*.

The tender of issue to be tried in this way accompanies the pleas of *nil debet* and *non detinet*, the whole plea in an action of debt, running thus,—

"And the said defendant, in his own person, comes and defends the wrong and injury, when, &c., and says that he does not owe to the said plaintiff the said sum of \$— above demanded, or any part thereof, in manner and form as the said plaintiff has above complained against him; and this he is ready to defend against



the said plaintiff and his *suite*, however the court here shall consider," &c. (3 Chit. Pl. 954; 3 Th. Co. Lit. 453; Co. Ent. 119 a; Lib. Ent. 467.)

5<sup>d</sup>. General Rule Touching the Tender of Issue.

The general rule touching the tender of issue, or more properly touching the *conclusion of pleadings* generally, is, that upon a *negative and affirmative*, the pleading shall *conclude to the country*; but otherwise, *with a verification*, but with this *exception*, that where *new matter is introduced* the pleading should always conclude *with a verification*. (St. Pl. 233; Id. (Tyler) 230; Saund. 103 a, n. (3); Com. Dig. Pleader, (E. 32).)

New matters may sometimes be introduced upon a *traverse*, as in case of a replication to a plea of "conditions performed," as above explained, (*Ante*, p. 921); when it must conclude, as by this rule appears, *with a verification*, to which defendant must rejoin according to the fact.

It was in pursuance of this rule that a *special traverse* at common law concluded with *a verification*; because in the *inducement* it states new matter. It will be remembered that now, in order more speedily to reach an issue, a special traverse concludes *to the country*. (V. C. 1873, c. 167, § 27; *Ante*, p. 802.)

3<sup>o</sup>. RULE III. ISSUE WHEN WELL TENDERED MUST BE ACCEPTED.

If the issue be *well tendered*, both in point of substance and in point of form, nothing remains for the opposite party but to accept or join in it; and he can neither demur, traverse, nor plead in confession and avoidance, although he may plead in *estoppel*. (St. Pl. 236-'7.)

The acceptance of the issue in case of a conclusion *to the country*, *i. e.* of trial *by jury*, is called the *similiter*, that word, when the pleadings were in Latin, being a prominent one in the *formula*; and when the issue tendered is one of *law*, in consequence of a demurrer, the acceptance of it is known as a *joinder in demurrer*.

W. C.

1<sup>d</sup>. The *Similiter*.

As the party has no option in accepting the issue, when well tendered, and as the *similiter* may, in that case, be added for him, the acceptance of the issue, when well tendered, is so much a matter of form that, by the statute of *jeofails*, the omission of a *similiter* is, as we have seen, *after verdict* cured, (V. C. 1873, c. 177, § 3); and perhaps it is so at common law, independently of any statute. (Bennett v. Holbech, 3 Saund. 319 a, n (6); Sayer v. Pocock, Cowp. 407; Grundy v. Mell, 1 Bos. & Pul. (N. R.) 28; Nadenbousch v. McRae, Gilm. 230.) It will be remembered also, that in order to prevent needless delays in the maturing of causes, it is, in Virginia, enacted by statute, that when the

plaintiff takes issue on the defendant's pleading, or traverses the same, or demurs, so that the defendant is not let in to allege any new matter, the plaintiff may, without giving a rule to rejoin, proceed as if there were a *similiter*, or a joinder in demurrer, (V. C. 1873, c. 167, § 28; *Ante*, p. 617.)

It will be observed that the rule expresses that the issue must be accepted only when it is *well tendered*. For if the opposite party thinks the *traverse* bad in substance or in form, or objects to the *mode of trial* proposed, in either case he is not obliged to add the *similiter*, but may demur. (St. Pl. 238.)

The *similiter* serves a two-fold purpose. It not only marks the acceptance of the question itself, but also of the mode of trial proposed. It seems to have been introduced originally with a view to the *latter* point only; for in ancient times the resort to a jury could, in general, be had only by the mutual *consent* of each party, and the *similiter* imported that consent. Accordingly, no *similiter*, or other acceptance of issue, is necessary when recourse is had to any of the *other modes* of trial, and the rule in question does not extend to these. Thus, when issue is tendered to be tried by the *record*, as in the example, *Ante*, p. 922-'3, the plaintiff is entitled to consider the issue as complete upon such tender, and no acceptance of it on the other side is essential. (St. Pl. 238-'9.)

#### 2<sup>d</sup>. Joinder in Demurrer.

The rule under consideration extends to an issue *in law*, as well as an issue *in fact*; for by analogy, it would seem to the *similiter*, the party whose pleading is opposed by a demurrer is required formally to accept the issue in law which it tenders by the *formula* above mentioned, called a *joinder in demurrer*, of which we have met with numerous examples. However, it differs in this respect from the *similiter*, that whether the issue in law be well or ill-tendered, in proper form or not, the opposite party is equally bound to join in demurrer. For it is a rule that *there can be no demurrer upon a demurrer*. (Bac. Abr. Pleas, &c. (N.) 2; St. Pl. 239-'40.)

### SECTION II.

#### *Of Rules which Tend to Secure the Materiality of the Issue.*

#### 2<sup>b</sup>. Rules which tend to secure the Materiality of the Issue.

It is very obvious, that in order to decide a cause, the point on which the parties mutually agree to rest it (that is, *the issue*), must be *material*. But in order that the issue may be material, it is of course requisite, that at every step in the series of pleadings which lead to it, there should be some pertinent and

material allegation or denial of fact. On this subject, therefore, a single general rule may be propounded in the following form:

**RULE.—ALL PLEADINGS MUST CONTAIN MATTER PERTINENT AND MATERIAL.**

Thus, if to an action of assumpsit against an administratrix, laying promises by the intestate, she pleads that she, the *defendant*, (instead of the intestate), did not promise, the plea is obviously immaterial and bad. So for the most part, place and time, as alleged by the adversary, otherwise than as *matter of description*, are not material, and therefore ought not to be made part of the issue by traversing them. (St. Pl. 241; Com. Dig. Pleader, (R. 8); 3 Saund. 317; Jones v. Powell, 5 B. & Cr. (12 E. C. L.) 647.)

With respect to traverses in particular, this general doctrine is illustrated by subordinate rules of a more special kind. Thus it is laid down, (1), That a traverse must not be taken on an immaterial point; and (2), That a traverse must not be too large, nor on the other hand, too narrow;

W. C.

**1<sup>c</sup>. A Traverse must not be taken on an Immaterial Point.**

This rule may be presented under several aspects as, (1), To prohibit a traverse upon a point *wholly immaterial*; (2), Upon an allegation prematurely made; (3), Of matter of aggravation; and (4), Of matter of inducement. And in the same connexion it must be observed, (5), That where there are several material allegations it is in the pleader's option to traverse which he pleases. (Com. Dig. Pleader, (R. 8), (G. 10); Bac. Abr. Pleas, &c. (H), 5);

W. C.

**1<sup>d</sup>. A Traverse is not Admissible upon a Point in itself wholly Immaterial.**

Thus, where in an action of trespass for assault and battery, the defendant pleaded that a judgment had been recovered, and an execution issued thereupon against a third person, and that the plaintiff attempted by force to rescue that person's goods taken under the execution from the sheriff's officer; and that in aid of the officer, and *by his command*, the defendant gently laid his hands (*molliter manus imposuit*) upon the plaintiff, to prevent his rescue of the goods, it was holden that a traverse of the *command of the officer* was bad; for even without such command, the defendant might lawfully interfere to prevent a *rescue*, which is a breach of the peace. (St. Pl. 242; Com. Dig. (G. 12); Bac. Abr. Pleas, &c. (H), 5; Bridgwater v. Bythway, 3 Lev. 113.) It would have been otherwise if the act had not been done to prevent a *rescue*. The command of the officer is then essential to the validity of the defence, and

may therefore be properly traversed. (*Button v. Cole*, 1 *Ld. Raym.* 309; *S. C.* 1 *Salk.* 409.)

2<sup>d</sup>. A Traverse is not Admissible upon an Allegation Prematurely Made.

Thus, if in debt on a bond the plaintiff declare that at the time of sealing and delivery the defendant was of full age, the defendant should not traverse this, because it was premature to allege it in the declaration; though if in fact he was a minor, he might plead his infancy, to which the plaintiff might then reply the same matter, viz: that he was of age, or rather traversing the infancy. (*St. Pl.* 242; *Bovy's Case*, 1 *Vent.* 217.)

3<sup>d</sup>. A Traverse is not Admissible of Matter of Aggravation.

Matter which tends only to increase the amount of damages, and does not concern the right of action itself, is known as matter of aggravation, and is not traversable. Thus, in trespass for chasing the plaintiff's sheep, *per quod* the sheep died, the dying of the sheep being aggravation only, ought not to be traversed. (*Leach v. Midgley*, 1 *Lev.* 283; *St. Pl.* 243; 1 *Chit. Pl.* 645.)

4<sup>d</sup>. A Traverse is not Admissible of Matter of Inducement.

Matter of inducement, that is, matter brought forward only by way of explanatory introduction to the main allegations, is for the most part not traversable. This, however, is open to many exceptions, for it not unfrequently happens that introductory matter is in itself essential, and of the substance of the case, and in such instances, though in the nature of inducement, it may nevertheless be traversed. (*St. Pl.* 243; *Com. Dig. Pleader*, (G. 14); *Kimersly v. Cooper*, 1 *Cro. (Eliz.)* 169; *Smith v. Hitchcock*, 1 *Cro. (Eliz.)* 201; *Bateman v. Ellman*, 2 *Cro. (Eliz.)* 866; *Gladstone v. Hewitt*, 1 *Crompt. & J.* 569, &c.)

5<sup>d</sup>. Where there are Several Material Allegations it is in the Option of the Pleader to Traverse which he Pleases.

Thus in trespass, if the defendant pleads that A was seised and demised to him, the plaintiff may traverse either the seisin or the demise. And so if in trespass, the defendant pleads that A was seised and enfeoffed B, who devised to C, from whom the land descended to D, who granted it to the defendant, the plaintiff may traverse which of the transfers he thinks fit. (*St. Pl.* 243-4; *Com. Dig. Pleader*, (G. 10); *Bac. Abr. Pleas. &c.*, (H.) 5; 1 *Chit. Pl.* 644 & seq.)

The reason of this principle is sufficiently obvious. If a case is built upon several allegations, each of which is essential to its support, it is as effectually destroyed by the demolition of any one of these parts, as of all. (*St. Pl.* 244.)

2<sup>c</sup>. A Traverse must not be too Large nor on the other hand too Narrow.

As a traverse must not be taken on an immaterial allegation, so when applied to a material averment, it ought in general to take in no more and no less of that allegation than is material. If it involve more the traverse is said to be *too large*; if less, *too narrow*; (1 St. Pl. 244; Com. Dig. Pleader, (G. 15), (G. 16); 1 Saund. 268, n (1), 269 a, n (2)); W. C.

1<sup>a</sup>. A Traverse must *not be too Large*.

A traverse may be *too large* by involving in the issue, quantity, time, place or other circumstances, which, though they form part of the allegation traversed, are immaterial to the merits of the cause. We may note (1), What is meant by the traverse being *too large*, together with instances thereof; and (2), The principle upon which a traverse must not be too large;

W. C.

1<sup>o</sup>. What is meant by a Traverse being *too Large*, together with Instances thereof

What is meant by a traverse being *too large* has been just above explained. It remains to state some instances thereof. If in an action on the case for stopping *three lights* the defendant traverse that *he stopped the said three lights*, it is bad, for if he stopped *any of them* the action lies. (Com. Dig. Pleader, (G. 15); Newhall v. Barnard, Yelv. 225.) So in an action on a policy of insurance of a *ship and tackle*, if the traverse be of the loss of the ship *and* tackle, it is bad as being too large, for it ought to be in the disjunctive, (ship *or* tackle,) inasmuch as the plaintiff is entitled to recover for *any part* lost. (Com. Dig. Pleader, (G. 15); Goram v. Sweeting, 3 Saund. 205, 207, & n (24); Osborne v. Rogers, 1 Saund. 267.)

Again in Dimmett v. Eskridge, 6 Munf. 308, Eskridge brought an action against Dimmett and others, for cutting down his mill-dam. The defendants pleaded, amongst other defences, that the plaintiff's dam was erected without due authority of law, and obstructed a public road and ford, so that the citizens of the commonwealth could no longer use the same, as they were accustomed to do. To this the plaintiff replied, that the mill-dam did not *entirely obstruct* the public road and ford, and that the citizens of the commonwealth were not *altogether prevented* from using the same. This was held to be *too wide or too large* a traverse, tending as it did, to raise an immaterial issue upon the mere *extent of the obstruction*, whereas any obstruction at all was illegal, and justified the defendant's conduct.

In Moore v. Boulcott, 1 Bing. N. C. (27 E. C. L.) 404 an action was brought on an attorney's bill. Defendant pleaded that the bill was for work *as an attorney at law and*

*in equity*, and that the action had been commenced within *less than one month* after the delivery of the bill, contrary to an English statute, which requires that at least one month shall elapse after the bill is delivered, before any action upon it shall be instituted. Plaintiff replied that the bill was not for work *at law and in equity*. The court of C. B. held the traverse to be *too wide*, and therefore bad, because it would have raised an immaterial issue whether the work was in law *and equity* both, whereas the statute applied if it was *in either*.

In *Stubbs v. Lainson & al*, 1 Mees. & W. 728, the action was against the sheriffs of London, for a false return on an execution, under which the plaintiff averred they had seized and *levied* (*i. e. made*) the money thereout. To this the defendants pleaded that they did not *seize the goods and levy the money thereout*, in manner and form as the plaintiff said. On demurrer, the court of exchequer held the *traverse too wide*; it being immaterial to the legal merits whether the defendants levied the money or not, if they seized the goods.

See also *Bradley v. Bardsley*, 14 Mees. & W. 873; *Smith v. Lovell*, 10 Com. B. (70 E. C. L.) 23, 24.

On the other hand, however, a *material allegation of title or estate* may be traversed, in general, to the extent to which it is alleged, though *it need not have been alleged to that extent*; and such traverse will not be considered *too large*. Thus, if A alleges that he, being *seised in fee*, put his cattle into the close in question, the defendant may traverse *these is in fee*; though any estate for life or years, at will, or a license from the owner, would enable him to put his cattle there. (Com. Dig. Pleader, (G. 16), (G. 10); *Leke's Case*, 2 Dy. 365 a; *Tatem v. Perient*, Yelv. 195 a, & n (1); 3 Saund. 206, n (22); *Id.* 207 a, n (24).)

2°. The Principle upon which a Traverse *must not be too large*.

The student can hardly be at a loss to see that the principle which forbids *too wide a traverse* is that it *involves in the issue what is immaterial*. Hence, where several facts combine to constitute one proposition, it is no violation of the rule to *traverse all*, for all *must be proved*. (*Robinson v. Raley*. 1 Burr. 316; *O'Bryan v. Saxon*, 1 B. & Cr. (9 E. C. L.) 908.)

2<sup>d</sup>. A Traverse *must not be too Narrow*.

Let us take notice of, (1), What is meant by a traverse being too narrow, with instances thereof; and (2), The principle upon which a traverse must not be too narrow;  
W. C.

1°. What is meant by the Traverse being *too Narrow*, and instances thereof.

A traverse is too narrow when it fails to answer fully the whole of the adversary's allegation, which it proposes to answer. Thus, if to an action on the case for slander, charging the words to have been spoken at S, on a day named, the defendant pleads that he spoke the words imputed to him at W, as counsel in a judicial proceeding, *absque hoc* that he spoke the words at S, *before or after* the day mentioned in the declaration, by which he excluded the day itself, and answered not to it, the traverse is *too narrow*, and for that reason is bad. (Com. Dig. Pleader, (G. 16); *Burkley v. Wood*, 4 Co. 14 b.) So in an action of assumpsit to recover a recompense for service from March 21, 1647, to November 1, 1664, the defendant pleaded that the defendant left the service on the 31st December, 1658; *without this* that the plaintiff served until November 1, 1664, and it was held to be too narrow a traverse, and therefore insufficient, because the plaintiff was entitled to recover in proportion to the time he served. (Com. Dig. Pleader, (G. 16); *Osborne v. Rogers*, 1 Saund. 269 a, & n (2), 268, n (1).)

In *Buckenham v. Francis & als*, 11 Moore, (22 E. C. L.) 40, which was an action of trespass for *breaking open the outer doors* of the plaintiff's dwelling-house, the defendants pleaded that they were sheriff's officers, and that an execution of *feri facias* upon the plaintiff's goods came to their hands as such officers, by virtue of which they *entered the house*. The court of C. B. held the plea bad, because it did not answer *the breaking*, and therefore tended to raise an *immaterial issue*; and so far it well illustrates the *principle*, but as the plea was by way of *confession and avoidance*, and not by way of *traverse*, the case cannot properly be ranked with instances of *too narrow a traverse*. The books abound in similar instances of like pleas held bad, because they gave only partial answers to declarations whilst professing to answer the whole of them. Amongst others may be mentioned *Barnard v. Duthy*, 5 Taunt, (1 E. C. L.) 27; *Lees v. Wright*, 1 D. & Ry. (16 E. C. L.) 391; *Peploe v. Galliers*, 4 Moore, (16 E. C. L.) 163; *Clarkson v. Lawson*, 6 Bingh. (19 E. C. L.) 266; *Clark v. Logans*, 2 Man. & Gr. (40 E. C. L.) 167; *Stemmers v. Yearsley*, 10 Bingh. (25 E. C. L.) 35; *Davis v. Cary* 15 Q. B. (69 E. C. L.) 418.

An application of the doctrine to a *traverse*, however, is afforded by the cases of *Davies v. Aston*, 1 Man. Gr. & Scott, (50 E. C. L.) 746; and *Hammond v. Colls*, 1 Man. Gr. & S., (50 E. C. L.) 916. In *Davies v. Aston* the action was *trover* for the value of cattle and goods of plaintiff, *to wit*: beasts of the plough, implements of husbandry, *books, bedsteads, &c.* Defendant by his plea justified the

seizure as for distress, for *rent in arrear*. Plaintiff replied that he was an *husbandman*, and that the goods mentioned in the court were beasts of the plough and implements of husbandry, there being then on the premises other available distress. This replication was held bad as being *too narrow*, not traversing the legality of the distress as to the *books and bedsteads*, although it professed to answer the whole plea. *Hammond v. Colls* was an *action of trespass quare clausum fregit*, for breaking plaintiff's close. The plea of the defendant states that defendant was his lessee of the *locus in quo*, and that in the lease was, amongst others, a condition that lessee should not assign in any way, which, notwithstanding, lessee had done *in a particular manner which was specified*. Plaintiff replied, that he had not assigned *in that manner*. The replication was held to be bad, because it limited the denial *to the specific mode* stated in the plea.

See also *Jones v. Stevenson*, 5 Munf. 1.

2°. The Principle upon which a Traverse *must not be too Narrow*.

The principle which forbids too narrow a traverse is the same as that which requires that *every pleading* shall really answer as much of the adversary's allegation *as it professes and undertakes to answer*, of which mention has been already made. (St. Pl. 215-'16; *Ante* p. 653-'4, &c.; *Buckingham v. Francis et als*, 11 Moore, (22 E. C. L.) 40; *Clarkson v. Lawson*, 6 Bingh. (19 E. C. L.) 266; *Stammers v. Yearsley*, 10 Bingh. (25 E. C. L.) 35; and other cases *supra*.)

SECTION iii.

*Of Rules which Tend to Produce Singleness in the Issue.*

3°. Rules which Tend to Produce Singleness in the Issue.

The following rules enforce singleness in the method of pleading or allegation, and by consequence tend to produce a single issue; namely: (1), Pleadings must not be double; and (2), It is not allowable at common law both to plead and to demur to the same matter;

W. C.

1°. RULE I. PLEADINGS MUST NOT BE DOUBLE.

The general proposition that *pleadings must not be double*, will lead to the discussion of the topics following, namely, (1), The nature of the rule against duplicity; (2), The object of the rule; (3), When the rule is relaxed at common law; (4), Rules touching the doctrine of duplicity; and (5), The modes of practice whereby the rule which forbids duplicity is avoided;

W. C.



1<sup>d</sup>. The nature of the Rule against Duplicity.

The rule applies both to the declaration and to the subsequent pleadings; and accordingly we may regard it, (1), As it respects the declaration; and (2), as it respects the subsequent pleadings;

W. C.

1<sup>e</sup>. The nature of the Rule against *Duplicity in respect to the Declaration.*

The rule against duplicity forbids, not only mere *double-ness* of allegation or answer in pleadings, but that there should be *more than one* allegation or answer, whether two or more. So far as the rule relates to the declaration it forbids, the statement of *several distinct matters* in support of an avowedly single demand; *e. g.*, several breaches (at common law) to one bond *in a penalty*; for as one breach at common law entitles the plaintiff to *the whole penalty*, the averment of *more than one* would be assigning several grounds for one cause of action. It is otherwise in Virginia, under our statute touching penal bonds and bonds on condition. (V. C. 1873, c. 173, § 16, 17; Acts 1874-'5, p. 58, c. 77; St. Pl. 252.)

But it will be observed, that by means of several counts, several causes of action, really or ostensibly different, may be presented in the same declaration, (*Ante*, p. 365, 576 & seq, 579 & seq; *Post*, p. 940, &c.); and of course each defendant, if there are several, may give a distinct answer to each cause of action or count. Whilst, therefore, the common law deprecates a multiplicity of issues, it did not wholly eschew it, nor insist invariably upon an absolute singleness of issue.

2<sup>e</sup>. The nature of the Rule against Duplicity in respect to the *Pleadings Subsequent to the Declaration.*

Duplicity in the pleadings subsequent to the declaration will of course as surely result in a multiplicity of issues as duplicity in the declaration itself, and is therefore as much to be avoided. Let us observe the application of the principle in respect to, (1), Pleas dilatory; (2), Pleas in bar; and (3), Replications and subsequent pleadings;

W. C.

1<sup>f</sup>. In Respect to *Pleas Dilatory.*

The rule against duplicity forbids several causes for controverting the jurisdiction of the court, or for quashing the declaration or writ, to be set forth *in one plea*; but several such pleas may be filed at once, it is supposed, under our statute, allowing the defendant to plead as many several matters, whether of law or fact, as he shall think necessary. (V. C. 1873, c. 167, § 24; 3 Th. Co. Lit. 406-'7.) And it may be said with confidence, under this

statute, that a dilatory plea may be filed *at the same time* with a plea in bar, always supposing the dilatory plea to be in time. (Jas. Riv. & K. Co. v. Robinson, 16 Grat. 440.)

The objection of duplicity in any manner of pleading can be taken advantage of, even at common law, only by special demurrer, (Com. Dig. Pleader, (E. 2); 1 Chit. Pl. 565); and therefore in Virginia cannot be taken advantage of at all, except as to dilatory pleas. (V. C. 1873, c. 167, § 32.)

2<sup>f</sup>. In respect to a *Plea in Bar*.

The plea, says Lord Coke, that contains duplicity or multiplicity of distinct matter to one and the same thing, whereunto several matters (admitting each of them to be good,) are required, is not allowable in law. (3 Th. Co. Lit. 406; Com. Dig. Pleader, (E. 2); 1 Chit. Pl. 564.) Thus, a release and *son assault demesne* cannot be contained in one plea to the same trespass, as either would defeat the action. But the defendant may introduce several facts into one plea, if they be constituent parts of the same entire defence, or be alleged as inducement to, or as a consequence of another fact. (1 Chit. Pl. 564; Com. Dig. Pleader, (E. 2).) The defendant may also plead different pleas to different parts of the declaration. (1 Chit. Pl. 564-5; Com. Dig. Pleader, (E. 1).)

3<sup>f</sup>. In respect to a *Replication*.

A plaintiff may no more reply two matters, one whereof goes to the whole, than a defendant may plead them. Substantially the same rule prevails at both stages at common law, although by statute the rule as to *pleas* has been greatly relaxed, as we have seen. Duplicity in the replication may be thus exemplified: H brought an action of trespass against O for breaking and entering his stable, cutting a beam and throwing down tiles from the roof; O justified as servant to G, and pleaded that G was seised of a wall in fee-simple, and because the beam was placed on G's wall without his consent, the defendant, as his servant, in order to remove the beam, did enter the stable and cut the beam as near to the wall as he could, doing as little damage as he could, and thereby the tiles were thrown down. The plaintiff replied, traversing that the wall was G's, and then further pleaded that the defendant of his own wrong did throw down the tiles for the cutting of the beam. The first traverse being a complete answer to the whole plea, the second made the replication *double*. (St. Pl. 254; Humphreys v. Churchman, Cas. Temp. Hardw. 289.)

2<sup>d</sup>. The Object of the Rule against Duplicity.

The object of the rule against duplicity in pleading, as we have seen, is to enforce a single issue upon a single subject of claim or defence; nor is the rule carried farther than is necessary to secure this object. Hence there may be introduced into a *declaration* several *distinct demands*; into the *plea* an answer to each one of such demands; or where there are several defendants, and they choose to sever in their defence, an answer by each defendant; and in the *replication*, a reply to each several plea, or to each several defendant, &c. (1 Chit. Pl. 259-60; St. Pl. 255.)

3<sup>d</sup>. When at Common Law, the Rule against Duplicity is Relaxed.

The rule against duplicity is at common law relaxed, as has just been intimated, (1), Where the subjects of demand or of defence are several and distinct; and (2), Where there are several defendants who choose to answer severally;  
W. C.

1<sup>c</sup>. Relaxation of the Rule against Duplicity, where the *subjects* of Demand or of Defence are several.

In respect to the *declaration* we may find an illustration of this principle in an action of assumpsit, where the plaintiff (as set forth *ante*, p. 581, and *post*, p. 942-3'), alleges various subjects of indebtedness, such as goods sold, work done, money lent, money paid, &c., as grounds in the aggregate of one promise; and also in an action of covenant, where plaintiff avers several breaches of the covenant, and claims damages therefor; and also in the action of debt on bond with collateral condition, where the plaintiff is by statute (V. C. 1873, c. 173, § 17,) allowed and required to assign as many breaches as he shall think fit, for which a jury assesses the damages in its discretion. (St. Pl. 255.)

In respect to a *plea*, we find an illustration of the exception to the rule excluding duplicity in any case where there are several distinct demands. An answer is allowed to each demand. And also where there are several defendants who offer separate defences, a plea may be put in by each.

And in respect to a *replication*, wherever the pleas are several, the replication may be, or rather must be, applicable to each separately. Nay, though the plea be single, yet the replication may give as to one portion of it one reply, and as to another portion may give a different reply. Thus, if an action be brought for trespasses in closes A and B, and the defendant pleads a single matter of defence applying to both closes, the plaintiff is at liberty, in his replication, to give one answer as to so much of the plea as applies to close A, and another answer as to so much of the plea as applies to close B. (St. Pl. 255 to 258.)

If the defendants have once united in the plea, they can-

not afterwards sever at the rejoinder, or other later stage of the pleading. (St. Pl. 258; *Morrow v. Belcher*, 4 B. & Cr. (10 E. C. L.) 704.)

The student can hardly fail to see that where, in respect of several subjects, or several defendants, a severance has thus taken place in the pleading, this may, of course, lead to a corresponding severance in the whole subsequent series; and (as the ultimate effect) to the production of *several issues*. And where there are several issues, they may respectively be decided in favor of different parties; and the judgment will follow the same division. (St. Pl. 258.)

- 2°. Relaxation of the Rule against Duplicity where there are *Several Defendants who choose to answer severally*.

The exposition of this case of relaxation of the rule has been anticipated under the preceding head, and nothing more need be said in relation to it.

- 4°. Rules touching the Doctrine of Duplicity of Pleading.

Such as above explained being in general the nature of duplicity, the following rules or propositions will tend to its further illustration, namely: (1), A pleading is double that contains *several answers*, whatever be the class or quality of the answer; (2), Matter may suffice to make a pleading double, though it be ill-pleaded; (3), Matter immaterial cannot operate to make a pleading double; (4), No matter will operate to make a plea double that is pleaded only as necessary inducement to another allegation; and (5), No matters, however multifarious, will operate to make a pleading double that together constitute but one connected proposition or entire point;

W. C.

- 1°. A Pleading is Double which contains *Several Answers* to the Adversary Averments, whatever be the class or quality of the Answer.

Thus, a pleading is double which contains several matters in abatement, or several matters in bar; or which contains one matter in abatement, and one in bar; or several matters in bar, whether by way of traverse, or by way of confession and avoidance, or one by way of traverse and another by way of confession and avoidance. (St. Pl. 258-'9; Com. Dig. Pleader, (E. 2); Bac. Abr. Pleas, &c. (K.) 1, 2; 1 Chit. Pl. 259, 491, 564, 687.)

- 2°. Matter may suffice to make a Pleading Double, *though it be ill-pleaded*.

Thus, in an action of trespass for an assault and battery, if the defendant pleads that for a justifiable cause he *gently laid his hands* on the plaintiff, and also a release from the plaintiff, without alleging either that it was by deed, or founded on a valuable consideration, (*Lodge v. Dicus*, 3 B.

& Ald. (5 E. C. L.) 611, 615; Add. Contr. 2), the plea is double, the justifiable cause and the release being each a matter of defence. And though the release was insufficiently pleaded, yet as it was a matter upon which a material issue might have been taken, it sufficed to make the plea double. (Com. Dig. Pleader, (E. 2); Bac. Abr. Pleas, &c., (K.) 2; St. Pl. 259.)

3°. Matter immaterial cannot operate to make a Pleading Double.

The cases which are commonly cited to illustrate this principle are *Executors of Greenlife v. W—*, 1 Dy. 426, and *Countess of Northumberland's Case*, 5 Co. 98 a; but without stating their import it will suffice to desire the student to observe that the doctrine above stated, that a plea may be rendered double by matter *ill-pleaded*, but not by immaterial matter, quite accords with the *object* of the rule against duplicity, as formerly explained. (*Ante*, p. 934). That object is the avoidance of several issues. Now, whether a matter be well or ill-pleaded, yet if it be sufficient in substance, so that the opposite party may go to issue upon it, if he chooses to plead over without taking the formal objection, such matter tends to the production of a separate issue; and is, on that ground, held to make the pleading double. On the other hand, if the matter be immaterial, no issue can properly be taken upon it; it does not tend, therefore, to a separate issue, nor, consequently, fall within the rule against duplicity.

4°. No Matter will Operate to make a Pleading Double that is Pleaded only as *Necessary Inducement* to another Allegation.

Thus it may be pleaded without duplicity, that after the cause of action accrued, the plaintiff (a woman) took husband, and that the husband afterwards released the defendant; for though the coverture is itself a defence (*in abatement*), as the release is *in bar*, yet the averment of the coverture is not in this case intended as a defence, but is merely a necessary introduction to that of the release. (Com. Dig. Pleader, (E. 2); Bac. Abr. Pleas, &c., (K) 2; St. Pl. 262; *Rowles v. Lusty*, 4 Bingh. (13 E. C. L.) 428.)

This exception to the general rule is prescribed by an evident principle of good sense and justice; for the party has a right to rely on any single matter that he pleases in preference to another, as in this instance, on the release in preference to the coverture; but if a *necessary* inducement to the matter on which he relies, when itself amounts to a defence, were held to make his pleading double, the effect would be to exclude him from this right, and compel him to rely on the inducement only. Furthermore, the inducement not being stated nor relied on as a defence, is not

traversable, nor capable of having an issue joined upon, and the case, therefore, is not within the reason of the rule against duplicity, which, it will be remembered, is to prevent a multiplicity of issues. (St. Pl. 262.)

- 5°. No Matters, however Multifarious, will Operate to make a Pleading Double, that *together Constitute but One connected Proposition or entire Point.*

Thus, to an action for assault and imprisonment, if the defendant plead that he arrested the plaintiff on suspicion of felony, he may set forth any number of circumstances of suspicion, though each circumstance may be alone sufficient to justify the arrest, for all of them taken together do but amount to *one connected cause of suspicion.* (St. Pl. 232-3; Vin. Abr. Double Pleas, (A. 7).)

This qualification of the rule against duplicity applies not only to pleadings in confession and avoidance, but to traverses also, so that one may deny as well as affirm, in pleading, any number of circumstances that together form but a single point or proposition. Thus, in an action of trespass for breaking the plaintiff's close, and depasturing it with cattle, the defendant pleaded a *right of common* in the close for the said cattle, being *his own* commonable cattle, *levant and couchant* upon the premises. The plaintiff in his replication traversed each of these averments severally, namely: that the cattle were the defendant's *own cattle*, that they were *levant and couchant* upon the premises, and that they were *commonable* cattle. To this replication the defendant demurred for duplicity, for that to deny either of the three circumstances alleged would have been a sufficient answer. The court, however, overruled the demurrer, because the *point* of the defence made by the plea was that the cattle in question were entitled to common; and this *point* was single, though it involved the *three several facts* that the cattle were the *defendant's own*, that they were *levant and couchant* on the land, and that they were *commonable* cattle. It was held, therefore, that the replication traversing these facts, in effect only brought in issue the single point, whether the cattle were entitled to common, and was consequently not open to the objection of duplicity. (St. Pl. 263; Robinson v. Raley, 1 Burr. 319-20.) A more familiar illustration is the case of Patcher v. Sprague, 2 Johns. (N. Y.) 462. It was an action of trespass for taking plaintiff's goods. Defendant pleaded that the goods were seized by a sheriff's officer under a lawful warrant (setting forth the proceedings), and that defendant acted in aid and by command of the officer, and it was held that as all the several matters set out in the plea made up but one defence, the plea was not double.

The most frequent instance of this cumulative traverse, as it may be called, occurs in the case of the replication *de injuria absque tali causa*. This replication, it will be remembered, alleges that the defendant did the act (the subject of complaint) of his own wrong, and "*without the cause alleged*;" and this cause frequently consists of several connected circumstances, of which the example formerly given (*Ante*, p. 671-'2,) may serve as an illustration. Another example is afforded by the case of *O'Brien v. Saxon*, 2 B. & Cr. (9 E. C. L.) 908, which was an action on the case for maliciously suing out a commission of bankruptcy against the plaintiff, to which the defendant pleaded that the plaintiff was a *trader*, and indebted to him in £100 and upwards, and became bankrupt, whereupon the defendant sued out the commission. The plaintiff replied *de injuria absque tali causa*, to which the defendant *demurred*, assigning for cause that the plaintiff was attempting thereby to put in issue three distinct allegations contained in the defendant's plea, viz: the plaintiff's *trading*, his *bankruptcy*, and the petitioning *creditor's debt*. But it was adjudged that these facts together constituted but *one proposition*, viz: that the plaintiff duly became bankrupt, and that the replication was therefore good. See a discussion of the abstract propriety of thus allowing these distinct matters to be all put in issue together, in *Selby v. Bardons*, 3 B. & Ad. (23 E. C. L.) 2, especially Lord Tenterden's dissenting opinion.

It must be remembered, however, that a restriction exists in the use of the replication *de injuria*, that it cannot be applied so as to include in the traverse any matter alleged on the other side, in the nature of *title or interest, commandment, authority from the adverse party, or matter of record*. If, therefore, any such matter be contained in the plea, and the plaintiff wishes to deny it, such matter must be traversed separately; or if he chooses not to point the denial to this, but to other matters in the plea, these other matters must separately form the subject of traverse. In the former case the denial is in the *common form*, in the words of the allegation; in the latter, the pleading may be with an admission of part of the matter alleged, and a traverse *de injuria absque residuo causæ*, thus: "the said plaintiff says that, although true, it is that the said defendant is seised, &c., for replication, nevertheless in this behalf the said plaintiff says, that the said defendant, of his own wrong, and *without the residue of the cause* in his said plea alleged, broke and entered the said close," &c. (*St. Pl.* 265; 3 *Chit. Pl.* 1204; 9 *Wentw. Pl.* 327; *Lucas v. Nockells*, 2 *Yon. & Jerv.* 304.)

The form of thus pleading, as given in Chitty & Wentworth, is to introduce the traverse *absque residuo causæ*, with a protestation, thus: The plaintiff ought not to be barred, because "*protesting* that the said defendant is not seised, &c.; for replication nevertheless," &c. But it being now provided by statute (V. C. 1873, c. 167, § 26), that "no party shall be prejudiced *by omitting a protestation* in any pleading," an *admission* may be in some cases adopted according to the form above, or the matter may perhaps better be passed by in silence. (St. Pl. 265, n (q); Philips' Case, 19 Grat. 510.)

It is to be observed, that the restriction above noticed, whereby matter of *title or interest, commandment, authority from the adverse party, or record*, is required to be separately traversed, is not to be taken as applicable merely to the use of the replication *de injuria*, but extends, it seems, to *all* cases of cumulative traverse; so that it may be said to be generally true that where any such matter is alleged in connection with other circumstances, it is not a case in which it is competent to the other party to traverse cumulatively; and that if he include all these circumstances in the same traverse, his pleading will be double. (St. Pl. 266.)

Lastly, upon this subject of duplicity of pleading, it is to be noted, that it is not an error of substance, notwithstanding it is so calculated to embarrass the determination of causes; and is, therefore, the subject only of *special demurrer*. (1 Chit. Pl. 261; 1 Saund. 337 a, & n (3); Lanplough v. Shortridge, 1 Salk. 219; Ryley v. Parkhurst, 1 Wils. 219; Smith v. Clench, 2 Ad. & El. N. S. (42 E. C. L.) 836.) This being the case, it would appear that the objection cannot be taken advantage of in Virginia at all, except as to dilatory pleas, (V. C. 1873, c. 167, § 32); a result which, in the opinion of the writer, makes still more to be deplored the policy contained in the statute just cited, and brings our law within the censure of Lord Hobart, who commends what he calls the *moderation* of the statute of 27 Eliz. c. 5, in that "it does not utterly *reject form*, for that were a *dishonor to the law*, and to make it in effect no art; but it requires only that *it be discovered* (*i. e.* the objection be disclosed), and not used as a secret snare to entrap." (Heard v. Baskerville, Hob. 232 a.)

Having thus set forth the rule against duplicity of pleading, together with its meaning, object, extent and application, we are next to advert to certain *modes of practice* whereby the effect of the rule is materially qualified, namely, the use of several counts, and the allowance of several pleas.



5<sup>d</sup>. Certain Modes of Practice whereby the Rule against Duplicity is evaded.

The modes of practice whereby the rule against duplicity is evaded are, (1), By several counts in the declaration; and (2), By several *pleas*, or answers to the declaration;

W. C.

1<sup>e</sup>. By Several Counts in the Declaration.

Let us advert to the use of several counts, (1), Where there are several causes of action actually distinct; and (2), Where one cause of action is stated in different aspects;

W. C.

1<sup>f</sup>. Where there are *Several Causes of Action actually Distinct*.

Where a plaintiff has several distinct causes of action, he was always allowed to pursue them cumulatively in the same suit, subject to certain rules which the law prescribes as to joining such demands only as are of *similar quality or character*, and as to which *the same judgment* is to be given. (St. Pl. 267; Bac. Abr. Actions, (C).) Thus he may join a claim of debt on bond, with a claim of debt on simple contract, and also on a judgment, and pursue his remedy for all three by the same action of debt. So if several distinct trespasses have been committed, these may all form the subject of one declaration in trespass; but on the other hand, a plaintiff cannot join in the same suit a claim of debt on a bond, and a complaint of trespass, these being dissimilar in kind. Such different claims or complaints, when capable of being joined, constitute different parts or sections of the declaration, and are known in pleading by the description of *several counts*.

An example or two will give the reader an exact idea of the nature of several counts, if indeed he has not already derived it from former references to the subject. (*Ante*, p. 365 & seq, 576 & seq, 579 & seq.)

If we suppose that the plaintiff has to complain of several assaults, he may thus frame his declaration :

### DECLARATION IN TRESPASS,

#### *For Assault and Battery.*

*Title of Court.* Circuit Court of A. County, to wit :

*Rules.*

Rules, ———

*Queritur.*

C. C. complains of D. D. of a plea of trespass, for this, to-wit :

*Statement of*

that the said defendant heretofore, to-wit, on the — day of

*Cause of*

—, in the year of our Lord, — with force and arms, made an

*Action.*

assault upon the said plaintiff, and beat, wounded, and ill-treated

*1st Count.*

him, so that his life was despaired of.

**2nd Count.** And also for this, that heretofore, to-wit: on the day and year aforesaid, the said defendant made another assault upon the said plaintiff, and again beat, wounded, and ill-treated him, so that his life was despaired of, and other wrongs to him then and there did,  
**Conclusion.** against the peace of the Commonwealth, and to the damage of the said plaintiff of \$—; and therefore he brings his *suite*.

So if the plaintiff has a claim against the defendant for a debt due by bond, and another due by promissory note, he may put them both into one declaration, thus:

### DECLARATION IN DEBT,

#### *On Bond, and on Promissory Note.*

**Title of Court,** Circuit Court of A. county, to-wit:

**and Rules.** —Rules, —

**Queritur.**

C. C. complains of D. D. of a plea that he render under unto him — dollars [*aggregate of amount claimed in both counts*] which to him he owes, and from him unjustly detains; for this, to-wit, that heretofore, to wit: on the — day of —, in the year of our Lord, —, the said defendant, by his certain writing obligatory, sealed with his seal, and to the court now here shown, the date whereof is the day and year aforesaid, acknowledged himself to be bound to the said plaintiff in the sum of — dollars, parcel of the said sum of — dollars above demanded, to be paid to the said plaintiff when the said defendant should be thereunto afterwards requested [*or according to the terms of the bond.*]

**Statement of Cause of Action.**

**1st Count Bond.**

**2nd Count, rom. Note.**

And for this also, that heretofore, to-wit, on the — day of —, in the year of our Lord —, the said defendant made his certain note in writing, commonly called a promissory note, signed by him, by which he promised to pay to the said plaintiff the sum of — dollars another part, and the residue of the said sum of — dollars, first above demanded, whenever the said defendant should be thereunto afterwards requested, [*or, according to the terms of the note.*]

**Breach.**

And the said plaintiff says, that although the said defendant has been often requested, he has not, as yet, paid to the said plaintiff either of the said sums of money above demanded, or any part of either, but the same to pay has hitherto wholly refused, and still does refuse, to the damage of the said plaintiff of — dollars; and, therefore, he brings his *suite*.

**Conclusion.**

#### 2°. Where a Single Cause of Action is stated in *Different Aspects.*

It will be remembered, that we formerly saw that several distinct causes of action do not always form the subject of several counts, (*Ante*, pp. 576 & seq., 579 & seq.); but that the counts are often only different phases of the same case, being resorted to with a view to avoid the danger of a *variance in the proof*, when some doubt exists as to how the evidence will turn out at the trial. Thus, if suit is to be brought on such a writing as the following:

\$1,000.

On demand, I promise to pay to C. C., one thousand dollars.

Witness my hand, &c.

D. D. (SEAL);

an inexperienced practitioner might hesitate to pronounce whether it was a *bond* or a *promissory note*, and then he would avoid all risk of mistake by having two counts in the declaration, in one of which it should be treated as a *sealed*, and in the other as an *unsealed* instrument.

A conspicuous instance of the use of several counts occurs, or within the memory of the writer, was wont to occur in actions of *assumpsit* and of debt (when there was no specialty), and especially where the object of the action was to recover on a general account, say for goods sold, work done, or services rendered, money advanced, &c. In such cases, no less than *seven counts* were often employed, which, because they were of frequent occurrence, are called *common counts*, namely:

(1). The count of *indebitatus assumpsit* (or in debt, the *indebitatus count*.)

This count sets out that, before the bringing of the action, and at that time, the defendant was indebted to the plaintiff in a named sum, for some specified transaction, as goods sold and delivered, work done, or services rendered, &c., and that, being so indebted, he undertook and promised (or in debt simply averring the indebtedness as above, or if anything like a promise is stated, using the word *agreed* instead of the word *undertook*, &c., 1 Chit. Pl. 394) in consideration thereof to pay, &c. (*Ante*, p. 579.)

(2). The count of *quantum valebant*.

This is appropriate only for *goods sold and delivered*.

It sets out that plaintiff had sold defendant certain goods, and delivered them, for which defendant promised to pay *as much as they were reasonably worth*; and that they were reasonably worth a sum named, of which defendant was notified. (*Ante*, p. 580.)

(3). The *quantum meruit* count.

This is appropriate only where the demand is *for work done, or services rendered*.

It sets out that plaintiff had done certain work, or rendered certain services to the defendant at his request, for which defendant promised to pay as much as the plaintiff *reasonably deserved to have therefor*, and that he reasonably deserved to have therefor a named sum, of which defendant was notified. (*Ante*, p. 580.)

(4). The count of *indebitatus assumpsit* (or in debt, *indebitatus count*.) *for money lent and advanced*.

This count differs from the first only in the subject-mat-

ter of indebtedness;—there it was goods sold, or work done, &c.;—here it is *money*, and *money lent and advanced* by plaintiff to defendant. (*Ante*, p. 580.)

(5), The count of *indebitatus*, &c., for *money paid, laid out and expended*.

This count differs from the preceding only in alleging the cause of indebtedness to be *money paid, laid out and expended* by the plaintiff for the defendant, and at his request. (*Ante*, p. 580.)

(6), The count of *indebitatus*, &c., for *money had and received*.

This is of a similar character to the two next preceding, only alleging the indebtedness to arise out of *money had and received* by defendant to the use of the plaintiff. (*Ante*, p. 580.)

(7), The count of *account stated*.

This count sets out that the plaintiff and defendant *accounted together* of and concerning various sums of money before that time due and owing by the defendant to the plaintiff; and that upon such accounting, the defendant fell into arrears with the plaintiff a sum named; and in consideration thereof *promised to pay*, or in debt, averring that thereby an action hath accrued to the plaintiff to demand the same. (2 Chit. Pl. 387; *Ante*, p. 580-'81.)

The 4th, 5th and 6th counts, of which the substance is stated above, are known as "*the money counts*," and can only be employed where there is that in the transaction to which they may be fitly applied according to *their terms*. Thus, if the transaction had no connection with *money lent*, or *paid*, or *had and received*, the money counts are not relevant, and may be omitted. And so, when it was customary to use the *quantum meruit* and the *quantum valebant* counts, they seldom occurred in the same declaration, the *quantum meruit* being applicable to work and labor, and the *quantum valebant* to goods sold.

However, it is conceivable that one count might embrace both goods sold and work done, as where a merchant had also a blacksmith's or carpenter's or tailor's shop, and rendering accounts to his customers, included the shop and store accounts in one statement.

In process of time it was perceived that the motive which led to the use of the *quantum meruit* and *quantum valebant* counts, namely, that in the *indebitatus* count it was requisite to prove the *precise amount* of indebtedness alleged, neither less nor more, was fallacious; and then the *quantum meruit* and *quantum valebant* counts were generally abandoned; and thus the number of counts usually inserted in a declara-

tion, in such a case as is supposed, were the five following, namely:

- 1, *Indebitatus* count for goods sold, &c.;
- 2, *Indebitatus* count for money lent ;
- 3, *Indebitatus* count for money paid ;
- 4, *Indebitatus* count for money had and received ;
- 5, *Indebitatus* count of account stated.

And these are all mentioned by Mr. Stephen in the earlier editions of his work, and are re-produced in Mr. Tyler's edition, p. 256, *ante*, p. 581.

The next step was to observe that the money counts were only *indebitatus* counts, with a difference in the *subject-matter* of the indebtedness, it being *money* in the latter, instead of *goods sold* and *work done*, as it was in the ordinary *indebitatus* count ; and that being so, that all the subjects might be very well embraced in one count, which should set forth as many of such causes as exist, goods sold, work done, or services rendered, money lent, &c., money paid, &c., and money had and received, and then aver a promise, in consideration thereof, to pay the whole. Thus, as but *one promise* (which is the *gist of the action*) is alleged, the rule against duplicity is not violated, while all the elements of indebtedness are introduced.

Thus, the three "*money counts*" being merged in the *indebitatus* count, the five were finally reduced to *two*, which are now customarily employed, namely, the *indebitatus* count, and the count of *account stated*. (*Ante* p. 581.)

The count of *account stated* is frequently so useful that wherever it is supposed that evidence can be given of a settlement of accounts had between the parties it is prudent to insert it. Thus, a statute provides, as we have seen, that "in every action of *assumpsit* the plaintiff shall file with his declaration an account, stating distinctly the *several items of his claim*, unless it be *plainly described* in the declaration." (V. C. 1873, c. 167, § 13) ; and notwithstanding the liberal construction adopted by the courts that this requirement is satisfied where the account filed describes the items merely as contained in a bill *previously rendered*; (Moore v. Mauro, 4 Rand. 488 ; Robinson v. Burks, 12 Leigh, 378 ; Fitch v. Leitch, 11 Leigh, 471 ; 4 Rob. Pr. 893,) it is yet sometimes inconvenient or expensive to file a bill of particulars, extending possibly through many folios of a merchant's ledger. If in such a case, there be a count of account stated, as the gist of the demand set out in that, is the *settlement* between the parties, the ascertainment of the balance and the plaintiff's promise to pay it, all of which are "*plainly described in the declaration*," it is believed that no bill of particulars is necessary, if the evidence is adapted to *prove*

*that count.* (Fitch v. Leitch, 11 Leigh, 471; but see 4 Rob. Pr. 893.)

Before passing away from the doctrine touching a *bill of particulars*, (for so it is usual to designate this account of items,) the student's attention should be directed to the fact that the statute applies *in terms* only to the action of *assumpsit*; and an interesting question presents itself whether the *equity* of the provision extends to an action of *debt* which might have been brought for the same cause? It is believed the statute applies, according to its terms, to the *action of assumpsit alone*. However, it is so essential that a defendant should be informed of what he is charged with, that it has long been the practice in England, whensoever the declaration is conceived in terms so general as not fully to apprise the opposite party of the demand which on the trial will be set up against him, to permit the latter to call upon his adversary for a more detailed and particular statement. (Le Breton v. Braham, 3 Burr. 1389; Lovelock v. Cheveley, 1 Holt. (3 E. C. L.) 552; Kitchen v. Blenchard, 1 Bos. & Pul. 378; Wade v. Beesley, 4 Esp. 7; Webster v. Jones, 7 Dowl. & Ry. (16 E. C. L.) 774; 4 Rob. Pract. 886 & seq.) And the revisors introduced into the Code of 1849 a prudent provision, which seems to have been generally overlooked, and which yet might often be made very useful, not only in the case under consideration but in others also. It is the provision that "*in any action or motion the court may order a statement to be filed of the particulars of the claim, or of the ground of defence; and if a party fail to comply with such order, may, when the case is tried or heard, exclude evidence of any matter not described in the notice, declaration, or other pleading of such party so plainly as to give the adverse party notice of its character.*" (V. C. 1873, c. 172, § 49.)

If the cause of action is such as cannot be fitly set forth in the terms of these *common counts*, resort must be had, as we have seen, to special ones adapted to the nature of the case, of which Mr. Chitty's great work on pleading affords copious illustrations. (2 Chit. Pl. 116 to 383.) Thus, the *common counts* are plainly not suitable to promissory notes, bills of exchange, warranties of title or quality of chattels sold, not accepting goods sold, &c., for which, as well as in a multitude of other cases, *special forms* of declaring must be used. See 1 Chit. Pl. 316 to 372; *Ante* p. 575 &c.

The joinder of several *distinct* causes of action in one declaration (in *separate counts* of course), sometimes presents a practical difficulty. The pleader may be occasionally at some loss to determine when the joinder may be made.

The best general rule seems to be that which has been already stated, (*Ante* p. 365) namely, that wherever the causes of action are of the *same nature*, and the *same judgment* is to be given in all, they may be joined in one declaration, though *the pleas be different*, as in case of a bond, promissory note, open account and judgment, all of which may be joined in different counts of one declaration; whilst on the other hand, a count against a party in *his own right* cannot be joined with one against him *as executor or administrator*, because, although the demands may be of the *same nature*, the *same judgment* cannot be given; for against the party in his own right the judgment is *de bonis propriis*, whilst against him in his representative character, it is *de bonis testatoris*, &c. (1 Chit. Pl. 229.)

In actions *ex contractu*, the plaintiff may join as many different counts as he has causes of action of the *same nature*, provided only the *judgment will be the same*. Hence, as we have seen, not only may debt *on bond* be joined with debt *on simple contract*, but it may be joined with debt *on judgment*. (Union Cot. Fact. v. Lobdell, 13 Johns. (N. Y.) 462; See 2 Saund. 117 f, note; Kinnaird v. Jones, 9 Grat. 183.)

So in actions *ex delicto*, several *distinct* trespasses may be joined in one declaration, always supposing that the *judgment is to be the same*. And several causes of action *in case* may be joined with counts in *trover*. Thus, *case* against a common carrier for losing goods committed to him as such, or against a bailee for immoderately riding a horse, may be joined with *trover* (1 Chit. Pl. 230.)

But it is always improper to join *any tort*, considered as such, with contract. (Creel v. Brown, 1 Rob. 266.)

Where there are several counts in a declaration, and one or more be good, although the rest be faulty, we have seen (*Ante* p. 895), that the demurrer ought to be, not to the whole declaration, but to the count or counts supposed to be defective. This is upon the principle that a demurrer raises the question whether or no there be matter in the declaration sufficient to maintain the action. If, therefore, there be several counts, and any one be good, it follows that there is matter enough to maintain the action, and so a demurrer to the whole declaration must be overruled. And it will be remembered that the same rule, founded on the same principle, applies wherever any *integral part* of the declaration is sufficiently set forth, although there may be other integral parts defectively stated; as for example, several breaches of condition or of covenant, any one of which is well assigned, or several matters of distinct demand, any one of which is well claimed. (Roe v. Crutchfield, 1 H. &

M. 361; *Martin v. Sturm*, 5 Rand. 693; *Power v. Ivie*, 7 Leigh, 147; *Hollingsworth v. Milton*, 8 Leigh, 50; *Henderson v. Stringer*, 6 Grat. 130; *Wright v. Michie*, Id. 354; *Smith v. Lloyd*, 16 Grat. 295.)

It should be remarked, that with us the defendant is allowed, instead of demurring, to ask the court at the trial to disregard the faulty count. And even if entire damages be given, yet if any one count be good, the verdict shall stand. (V. C. 1873, c. 173, § 12.)

If indeed the objection be that there is a *misjoinder of actions* or counts, a demurrer to the *whole declaration* is proper, the objection being not more to one count than another. (*Henderson v. Stringer*, 6 Grat. 134.)

Finally upon this topic, let it be observed, (what should have been mentioned before), that since the Code of 1849 declares that "in any case in which an action of trespass will lie, there may be maintained an action of trespass on the case," (V. C. 1873, c. 145, § 6,) counts in *trespass* may be joined to counts *in case*, in an action on the case. (*Parsons v. Harper*, 16 Grat. 64.)

## 2°. The Mode of Evading the Rule against Duplicity by Several Pleas.

We have already seen (*Ante*, p. 934,) that the rule against duplicity has never been understood to prevent several defendants from *severing* in their defence, and filing several pleas; nor to prevent a defendant from giving distinct answers to different claims or complaints on the part of the plaintiff. The objection at common law was to allow a defendant to give several distinct answers to the *same* claim or complaint. Let us take notice then of, (1), Several pleas by each of several defendants, or in answer to distinct demands in the declaration; and (2), Several pleas in answer to a single demand;

W. C.

### 1°. Several Pleas by each of *Several Defendants*, or in answer to *Distinct Demands* in the Declaration.

Where there are several defendants, each may plead a several plea; and where there are distinct demands set up in the declaration, the defendant may at common law plead a separate plea to each. Thus, in an action of debt against two persons, one may plead *non est factum*, and the other *payment*; and in an action of trespass for two assaults, (in different counts, as we have seen), the defendant may plead as to the first count, not guilty; and as to the second, the statute of limitations, namely, that the cause of action did not accrue within one year before the beginning of the suit, as in the following example:



## PLEAS,

*In Trespass for Assault and Battery.*

And the said defendant, by his attorney, comes and says, that  
*First plea to* as to the first count of the said declaration, he is not guilty of the  
*first count,* said trespass therein mentioned, or any part thereof, in manner and  
*Not guilty.* form as the said plaintiff hath above thereof complained. And of  
 this the said defendant puts himself upon the country.

And as to the second count of the said declaration, the said defen-  
*Second plea to* dant says, that the said plaintiff ought not to have or maintain his  
*second count,* action aforesaid thereof against him, because he says that the said  
*Stat. limitations* supposed cause of action in the said second count mentioned, did not  
 accrue to the said plaintiff within one year next before the com-  
 mencement of this suit. And this the said defendant is ready to  
 verify. Wherefore he prays judgment, if the said plaintiff, as to  
 the said second count of the said declaration, ought to have or  
 maintain his action aforesaid thereof against him. See 2 Saund.  
 63 c, n (1); Roberts v. Read, 16 East. 215; Dyster v. Battye, 3  
 B. & Ald. (5 E. C. L.) 448.

Nor is the defendant, in pleading different pleas to dif-  
 ferent parts of the declaration, confined to pleas of the  
*same kind.* Thus, he may plead *in abatement* to one part,  
 and in *in bar* to another. (St. Pl. 270-'71; 3 Saund.  
 209 e, n (1).)

2<sup>d</sup>. Several Pleas *in answer to a Single Demand.*

It may happen that the defendant may have several  
 distinct answers to give to the same claim or complaint.  
 Thus, to an action of trespass for an assault and battery,  
 he may have ground to deny the trespass, and also to al-  
 lege that it did not accrue within one year, the period  
 within which the action is limited by the statute of limi-  
 tations. But at common law, it was not competent to him  
 to plead these several answers, because that would have  
 infringed the rule against duplicity. The defendant,  
 therefore, was obliged to elect between his different de-  
 fences, where he had several, and to rely on that which,  
 in point of law or fact, he might deem most impregnable.  
 But as a mistake in that selection might occasion the loss  
 of the cause, contrary to its real merits, this restriction  
 against the use of several pleas to the same matter, after  
 being for ages observed in its original severity, was at  
 length deemed so adverse to the principles of justice as  
 to warrant the alternative of perplexing the jury with a  
 multiplicity of issues, and was accordingly relaxed by the  
 statute 4 Anne, c. 16. That statute enacts that "it shall  
 be lawful for any defendant or tenant in any action or  
 suit, or for any plaintiff in replevin, in any court of record  
 (the plaintiff in replevin being virtually the *defendant in*  
*the suit*), with *leave of the court*, to plead as many several

matters thereto as he shall think necessary for his defence."

Under this act the course is for the defendant, if he wishes to plead several matters to the same subject of demand or complaint, to apply previously for a rule of court permitting him to do so, and upon this, a rule is accordingly drawn up for that purpose.

The form of pleading several pleas under this statute, (and the same form is employed under the corresponding statute in Virginia, notwithstanding our statute, unlike that of 4 Anne, requires *no leave of court*,) is exemplified as follows :

# PLEAS,

## *In Trespass for Assault and Battery.*

*First plea,* And the said defendant, by his attorney, comes and says, that he  
*Not guilty.* is not guilty of the said trespass above laid to his charge, or any part thereof, in manner and form as the said plaintiff hath above thereof complained.

*Second plea,* And for a further plea in this behalf, the said defendant says,  
*Stat. limitations.* that the said supposed cause of action in the said declaration mentioned, did not accrue within one year before the commencement of this suit. And this the said defendant is ready to verify.

See 2 Saund. 63 c. n (1); Roberts v. Read, 16 East. 215; Dyster v. Battye, 3 B. & Ald. (5 E. C. L.) 448.

The corresponding statute in Virginia is still more liberal to the defendant. (V. C. 1873, c. 167, § 24.) It allows him to "*plead as many several matters, whether of law or fact, as he shall think necessary.*" No leave of court is required, and the matters of defence may be at once *of law*, (by way of *demurrer*), and *of fact*, (by way of *plea*.)

It may not, perhaps, be *necessary*, strictly speaking, to put in the pleas *at the same time*, but it is usual and prudent so to do; and indeed, it can hardly be supposed that the legislature designed to divest the courts of all control over the time of filing defences, so that a defendant, at ever so advanced a period of the action, may, by filing a new plea, oblige the plaintiff to continue the cause. (1 Rob. Pr. (1st ed.) 231; Jas. Riv. & Ka. Co. v. Robinson, 16 Grat. 440.) Nor does there seem to be any sufficient reason to forbid a defendant to plead *at the same time*, in abatement and in bar of the action, supposing the former plea to be filed in time. (Jas. Riv. & Ka. Co. v. Robinson, 16 Grat. 438.)

When several pleas are pleaded, either to different matters, as at p. 948, or by virtue of the statute, to the same matter, as in the last example, p. 949, the plaintiff

may, according to the nature of his case, either demur to the whole, or demur to one plea and reply to the other, or make a several replication to each plea; and in the two latter cases, the result may be a corresponding severance in the subsequent pleadings, and the production of *several issues*. But whether one or more issues be produced, if the decision, whether in law or in fact, be in the defendant's favor as to any one or more pleas, he is entitled to judgment, though he fail as to the remainder; that is, he is entitled to judgment in respect to that subject of demand or complaint to which the successful plea relates; and if it were pleaded to the whole declaration, to judgment generally, though the plaintiff should succeed as to all the other pleas. (St. Pl. 273.)

The use of *several pleas* was probably designed by the statute, for those cases only where there are really several grounds of defence, (Lord Clinton v. Morton, 2 Stra. 1000,) but in practice it is often carried further. Thus, the general issue is usually pleaded along with a special plea, whether there be any real ground for denying the declaration or not, for thereby the plaintiff is put to the proof of the declaration, or the material part of it, before the defendant can be required to establish his special plea; and thus the defendant has the chance of succeeding, not only by the strength of his own case, but by the failure of the plaintiff's proof. Some efforts were at one time made under the statute of Anne, to restrain this apparent abuse of the indulgence which the statute conferred. For that *leave of the court* which was expressly required was formerly often refused when the proposed subjects of plea appeared to be *inconsistent*; and on this ground, leave has been refused to plead to the same trespass, *not guilty*, and *accord and satisfaction*, or *non est factum* and *payment* to the same demand. (Com. Dig. Pleader, (E. 2); St. Pl. 274.) But in modern English practice such pleas, notwithstanding the apparent repugnancy between them, are permitted, unless under special circumstances, (Rama Chitty v. Hume, 13 East. 255); and the only pleas, perhaps, which have been uniformly disallowed on the mere ground of inconsistency are those of the general issue and *a tender*. (St. Pl. 275. But see Shaw v. Lord Alvanley, 2 Bingh. (9 E. C. L.) 325; Le Conte v. Pendleton, 1 Johns. Cas. 104; 1 Chit. Pl. 593 & seq. & notes.)

Our statute, like that of 4 Anne, extends not to any pleading *subsequent to the plea*, and therefore not to the replication, rejoinder, &c. At those subsequent stages of the altercation, if a demurrer is first put in, it may, upon being overruled, be withdrawn by leave of court, and the

pleading be answered in point of fact; and if that be not done before the end of that term of the court, final judgment must be entered against the demurrant. (*Maggort v. Harnsbarger*, 8 Leigh, 532.) The legislative provision allowing several *pleas* was confined to that stage of the altercation under the impression, probably, that it was in that part of the pleading that the hardship of the rule against duplicity was most seriously and frequently felt, and that the multiplicity of issues which would be occasioned by a further extension of the enactment would be attended with inconvenience and expense more than equivalent to the advantage. The effect of this state of the law is no doubt often to put the plaintiff, in his replication particularly, at a disadvantage; but it is a disadvantage which is unavoidable without incurring a much more serious disadvantage on the other side, in the multiplicity of issues which would result.

No leave of court being required under our statute in order to file several pleas, there is nothing to prevent the most inconsistent ones from being put in at the same time, except the apprehension of the damaging effect which grossly incompatible defences may have on the minds of the jury which tries the cause. (*Walker's Ex'or v. Ellis*, 2 Munf. 101; *Syme v. Griffin*, 4 H. & M. 277.)

Mr. Stephen observes (St. Pl. 276,) that the power of pleading several matters extends in England, to pleas *in bar* only, and not to those of the *dilatory class*. In Virginia, the statute makes no discrimination, nor does it empower the court to make any. Hence, with us the defendant has a right to plead several *dilatory* matters at the same time, and probably, as we have seen, to plead a dilatory and peremptory plea together, if the former be in season. (1 Rob. Pr. (1st ed.) 331; *Jas. Riv. & Ka. Co. v. Robinson*, 16 Grat. 440.)

2°. RULE II.—IT IS NOT ALLOWABLE TO PLEAD AND TO DEMUR TO THE SAME MATTER.

This rule depends on the same principles as the last. As it is not allowable to *plead* double, lest several issues in fact in respect of the same matter should arise; so it is not permitted both to *plead and demur* to the same matter, lest an issue in fact and an issue in law, in respect of a single subject, should be produced. The party, therefore, must at common law make his election. It is, however, worth observing, that to allow one to plead and to demur at the same time is likely to lead to far less confusion and inconvenience than the pleading of several matters of fact, the issues upon which must be tried by a jury. Indeed, the issue of law arising upon a demurrer, tried as it is by the court, would never oc-

casation any embarrassment at all, nor necessarily any delay. There seems, therefore, no reason of sound policy why the privilege of demurring and pleading to the same matter at the same time, should not be extended to every stage of the altercation.

The rule, it will be observed, only prohibits the pleading and demurring *to the same matter*. It does not forbid this course as applicable to *distinct statements*. Thus, a party may plead to one count, or one plea, and demur to another. The reason of this distinction is apparent from the foregoing discussion upon the subject of duplicity in pleading.

The statute of 4 Anne, it is to be remarked, does not affect this rule at any stage of the pleading; but with us, in so far as it respects the defendant's answer to the plaintiff's declaration, the rule is obviated expressly by the statute allowing the defendant to plead as many several matters, *whether of law or fact*, as *he* shall think necessary. (V. C. 1873, c. 167, § 24; *Stone & Co. v. Patterson*, 6 Call. 71; *Waller's Ex'ors v. Ellis & als*, 2 Munf. 88; *Lyons v. Griffin*, 4 H. & M. 277; *Furniss v. Ellis & al*, 2 Brock. 14.) But at subsequent stages of the pleading—as, for instance, at the replication, &c., the rule is still applicable as it was at common law. (See *Jones v. Stevenson*, 5 Munf. 1; *Lang v. Lewis*, 1 Rand. 277.). The plaintiff can give one answer, either of law or of fact, but no more, to each plea, &c.

This inconvenience, however, may be evaded, as we have seen, in the replication and subsequent stages of the altercation, by demurring to the adversary's pleading; and if the demurrer be overruled, obtaining leave from the court (which is conceded as of course) to withdraw the demurrer, and to answer in point of fact.

#### SECTION IV.

#### *Of Rules which tend to Produce Certainty or Particularity in the Issue.*

##### 4<sup>b</sup>. Rules which tend to Produce *Certainty or Particularity* in the Issue.

The rules tending to produce certainty in the pleadings, and by consequence certainty in the issue, are very numerous, and in their nature do not easily admit of methodical arrangement. Mr. Stephen's enumeration of such of them as appear to be of principal importance, is, however, eminently clear and satisfactory, and in substance will be now presented under the eight following heads, with several subordinate divisions in connection with each, namely, (1), Pleadings must have *certainty of place*; (2), Pleadings must have *certainty of time*; (3), Pleadings must *specify quantity, quality, and value*; (4),

Pleadings must *specify the names of persons*; (5), Pleadings must *show title*; (6), Pleadings must *show authority*; (7), In general, whatever is alleged in pleading *must be alleged with certainty*; and (8), Rules of a subordinate kind, *in limitation and restriction of the principal rules touching certainty*; W. C.

#### 1°. RULE I. THE PLEADINGS MUST HAVE CERTAINTY OF PLACE.

The thoughtful reader will naturally conceive that the sole object and effect of this rule is to require that all pleadings shall specify, with reasonable certainty, the place where the facts happened which the pleadings set forth, in those cases where the *locality of the facts* is an essential part thereof; and that the rule would not call for a statement of the place where the locality was non-essential to the merits. This is, indeed, the present state of the law with us and in England, but it has been arrived at by very slow degrees, and is very far from what the common law was, or from the law of either country prior to 1834 in England, or 1850 in Virginia. Nor can the student have an adequate idea of the subject, without tracing the history of the doctrines relating to it from the beginning.

Let us then examine, (1), The reasons originally for requiring pleadings to have certainty of place; (2), The original doctrine touching the *venue in the action*; (3), The doctrine touching the *venue in the body of the pleading* to the fact alleged; (4), The modification occasioned by 16 and 17 Car. II, c. 8, and by 4 Anne, c. 16; (5), The doctrine as to the instances where the place must be *stated truly*; and (6), The doctrine touching a *change of venue*;

W. C.

#### 1<sup>d</sup>. The Reasons Originally for Requiring Pleadings to have Certainty of Place.

We have seen that originally jurors were *not triers* of the matter in controversy, from the testimony laid before them, as in modern times, but were *recognitors* or witnesses, in some measure at least, cognizant, of their own knowledge, of the matter in dispute. (*Ante*, p. 574.) Hence, they were of course to be summoned in general from the particular place or neighborhood where the fact happened; and in order to know into what county the writ of *vinire facias* for summoning them should be sent, and to enable the sheriff to execute that writ, it was necessary that the issue, and therefore the pleadings out of which it arose, should show particularly what that place or neighborhood was; not the county merely, but the *parish, town, or hamlet* as well. Such place or neighborhood was called the *venue* or *visme* (from the Latin *vicinetum*), and the statement of it in the pleadings obtained the same name; to allege the place be-

ing, in the language of pleading, to *lay the venue*. (St. Pl. 280; Com. Dig. Pleader, (C. 20); 3 Th. Co. Lit. 464 & seq, & n (8); Bac. Abr. Visne or Venue, (A), (B), (D); *Ilderton v. Ilderton*, 2 H. Bl. 161.)

It was accordingly the rule at common law, that every allegation in the pleadings upon which issue could be taken, that is, every material and traversable allegation, (supposing it to be in the affirmative form), should be *laid* with a *venue*; that is, state the place, (including the parish, town or hamlet, as well as the county), at which the alleged fact happened. (Th. Co. Lit. 464, & n (8); Com. Dig. Abatement, (H. 13); *Id.* Pleader, (C. 20).)

2<sup>d</sup>. The Original Doctrine touching the *Venue in the Action*.

Besides the venue laid with each traversable fact, a venue was also laid in the *margin* of the declaration, at its commencement, by inserting there the name of the county in which the several facts mentioned in the body of the declaration, or some principal part of them, occurred. This was styled the *venue in the action*; and the action was said to be *laid* or brought *within that county*, because it was always the same county as that into which the original writ had issued at the commencement of the suit, and because the action was always tried by a jury of that county, unless a new and different venue happened to be laid to some traversable fact in the subsequent pleadings on which issue was joined. (St. Pl. 381.)

3<sup>d</sup>. The Doctrine touching the *Venue in the Body of the Pleading*, to the Fact Alleged.

The *venue in the body of the pleading*, to each traversable fact alleged, seems to have been unquestionably the original practice, in order to subserve the purpose of determining the place whence the jurors should be summoned, in case the issue should be one of fact to be tried by a jury. Thus, in an action of debt on a bond, if the declaration alleged the bond to have been made at Westminster, in the county of Middlesex, (which is *the venue in the action*), and the defendant pleaded a release, he would lay this new traversable averment with a *venue*, (the *venue in the body of the pleadings*); and if this venue happened to differ from that in the declaration, being laid for example at Oxford, in the county of Oxford, and issue were taken on the plea, such issue by the ancient practice would be tried by a jury from Oxford, and not from Westminster, the form of the writ of *venire facias* being "*venire facias duodecim liberos et legales homines de vicineto de O, (i. e. the parish, town or hamlet, as well as the county), per quos rei veritas melius sciri poterit,*" &c. (St. Pl. 282-'3; Com. Dig. Action, (N. 12); 3 Reeves' Hist. E. L. 110; 1 Saund. 246 b.)

But this ancient practice in time underwent very considerable changes. When the jury began to be summoned no longer *as witnesses*, but *as judges*, to determine the fact from the testimony of others judicially examined before them, the reason for summoning them from the immediate neighborhood ceased to apply, so that at length it came to be considered a sufficient compliance with the writ, (whose form was still preserved) to summon as many as *two hundredors*, instead of the whole panel from the same *hundred* in which the place laid for venue was situated. (St. Pl. 284.)

4<sup>d</sup>. The Modification occasioned by 16 & 17 Car. II, c. 8, and by 4 Anne, c. 16.

Whilst the law was in the state pointed out just above, the statute 16 & 17 Car. II, c. 8, was enacted, by which it was provided, that "after verdict, judgment shall not be stayed or reversed, for that there is no right venue, so as the cause were tried by a jury of the proper county or place *where the action is laid*." This provision, which was intended to cure what had before been an error, namely, the summoning of the jurors from the *venue in the action*, instead of from the *venue laid to the fact in issue*, produced the remarkable effect of converting the error into a regular and uniform practice; so that thenceforth, where the *venue to the action* differed from the *venue to the fact in issue*, the juries were constantly summoned, not from the latter venue, but from the *venue of the action*. (St. Pl. 284-'5; 1 Saund. 247, n (1); 2 Saund. 5, n (3).)

Another change was afterwards wrought by the statute 4 Anne, c. 16. This act provided, that "every *venire facias* for the trial of any issue shall be awarded of the *body* of the proper county where such issue is triable," instead of being awarded, (as in the ancient form of the writ,) of the particular *parish, town or hamlet*. From this time, therefore, the *form* of the writ has been changed, and commands the sheriff to summon twelve good and lawful men, &c., "from the *body* of his county." (St. Pl. 285-'6.)

In this altered state of things there was no longer any real utility in the practice of laying a venue to each traversable fact in the body of the pleadings. The practice continued, however, to be insisted on in England, until the Rules of Court of Hilary Term, 4 Wm. IV, (1834); and in Virginia, until the revision of 1850 introduced provisions bringing about a similar result as the English rules of 1834. The Virginia statute enacts that "it shall not be necessary in any declaration or other pleading, to set forth *the place* in which any contract was made, or act done, unless when, from the nature of the case, the *place is material or tra-*



*versable*; and then the allegation may be, as to a deed, note, or other writing bearing date at any place, that it was made at such place, or as to any other act according to the fact, without averring or suggesting that it was at or in the county or corporation in which the action is brought, unless it was in fact therein." (V. C. 1873, c. 167, § 8.) And as a pendant or corollary to that general proposition, it is provided also, that "it shall not be necessary in any action to aver that the cause of action arose, or that the matter is within the jurisdiction of the court." (V. C. 1873, c. 167, § 9.) And furthermore, that "all allegations which are not traversable, and which the party could not be required to prove, may be omitted, unless when they are required for the right understanding of allegations that are material." (V. C. 1873, c. 167, § 10.)

5<sup>d</sup>. The Doctrine as to the Instances where the *Place must be Stated Truly*.

Before the change in the constitution of juries above mentioned, the venue was of course always to be laid in the true place where the fact arose, for so the reason of the law of venue evidently required. But when, in consequence of that change, this reason ceased to operate, the law began to distinguish between cases in which the truth of the venue was material, or of the substance of the issue, and cases in which it was not so. A difference began now to be recognized between *local* and *transitory* matters. The former consisted of such facts as carried with them the idea of some certain place, comprising all matters relating to the *realty*, and a few others; the latter consisted of such facts as might be supposed to have happened *anywhere*, and therefore comprised debts, contracts, and generally all matters relating to the person or personal property. With respect to the former, it was held, that if any *local* fact were laid in pleading at a certain place, and issue was taken on that fact, the place formed part of the substance of the issue, and must therefore be proved as laid, or the party would fail as for want of proof. But as to transitory facts, the rule was that they might be laid (under a *videlicet*) as having happened at one place, and might be proved on the trial to have occurred at another. (St. Pl. 288.)

Henceforth actions were divided into, (1), Local; and (2), Transitory; and must accordingly be discussed with reference to that distribution;

W. C.

1<sup>o</sup>. Local Actions.

An action is *local* if all the principal facts on which it is founded be local, as above explained; and *transitory* if any principal fact be of the transitory kind. In a local ac-

tion it is a rule that the plaintiff must lay the venue in the action truly, for it must be proved as laid. The local actions embrace all real and mixed actions for the recovery of land, and at common law those personal actions (although brought merely for damages, or other pecuniary redress,) which are designed to redress injuries to real property, as trespass *quare clausum fregit*, case for nuisance or waste, or for torts connected with rights of common, ways, water-courses, &c.; for rent due and in arrear, provided the action is founded, not on the *contract itself*, which is transitory, but on the *privity of estate*. Thus, if the lessor sues the *lessee*, whether in debt, covenant, or assumpsit, the action is *transitory*; but if the lessor sues the *assignee of the term*, the action being founded on privity of estate, is *local*. (1 Chit. Pl. 298-9, 300, 301 & seq; 1 Saund. 241 d, n (5).)

From this state of the law it follows that, at common law, if an action be local, and the facts arose out of the country, such action cannot be maintained at all; that is, not in a home tribunal, for as the venue in the action, in the *margin*, is to be laid truly, there is no county in which, consistently with the rule, it can be laid. Although it is said that if there be no court of justice to which the plaintiff may resort in the country in which the wrong is alleged to have occurred, the truth of the venue in the action is then not allowed to be controverted. (St. Pl. 289; 1 Chit. Pl. 299; *Doulson v. Matthews*, 4 T. R. 503-'4; *Shelling v. Farmer*, 1 Stra. 646; *Mostyn v. Fabrigas*, Cowp. 180-'81; *Livingston v. Jefferson*, 1 Brock. Cir. Ct. R. 206 & seq.)

The distinction between actions local and transitory, exists in Virginia; but with us, whilst all *real and mixed* actions, and they alone, are *local*, and must be brought in the county or corporation where the land, or *any part thereof*, may be, (V. C. 1873, c. 165, § 1, (cl. 3),) *all personal actions*, on the other hand, are *transitory*. (V. C. 1873, c. 165, § 1, (cl. 1, 2, 4, 5).)

## 2°. Transitory Actions.

A transitory action has already been explained to be one in which any principal fact is of the *transitory kind*, as above described. In such an action, therefore, the venue in the action may be laid in any county that the plaintiff pleases, notwithstanding the facts really occurred abroad; and upon issue joined, the writ of *venire facias* is sent into the county where the venue in the action is laid. And such accordingly is at common law the rule, under the practice which allowed the venue *in the action*, rather than the venue *in the body of the pleadings*, to the point in issue, to determine the county to which the writ of *venire facias* should

be sent, and the trial should take place. But this rule is subject to a check interposed by another regulation, which is said to have been established by the courts about the time of James I, (*per* Holt, C. J., *Knight v. Farnaby*, 2 Salk. 670), viz: that which relates to the *changing of the venue*, whereby defendants are enabled to protect themselves from any inconvenience they might apprehend from the venue being laid contrary to the fact, and enforce, if they please, a compliance with the stricter and more ancient system. By this practice, when the plaintiff in a transitory action lays a false venue, the defendant is entitled to *move the court to have the venue changed; i. e.*, altered to the right place; and the court, upon affidavit that the cause of action arose wholly in the county to which it is proposed to change the venue, will in most cases grant the application, and oblige the plaintiff to amend his declaration in this particular, unless he, on the other hand, will undertake to give at the trial some material evidence arising in the county where the venue was laid. (St. Pl. 289-'90.)

In Virginia, as we have seen, *all personal actions are transitory*; but they are not therefore allowed to be brought in whatsoever county or corporation the plaintiff may be pleased to elect. On the contrary, the statutes lay down stringent rules by which the determination of the county or corporation where the suit is to be instituted, shall be regulated. The most prominent general rules prescribed, amongst several others, (all of which have been described, *Ante*, p. 526-'7), are that the suit shall be brought in the county or corporation wherein *any of the defendants* may reside, or where the *cause of action, or some part thereof, arose*. (V. C. 1873, c. 165, § 1, (cl. 1) & seq.)

Hitherto the rule as to the averment of *place* in the pleadings has been considered, well nigh exclusively, in reference to the ancient and nearly extinguished learning of *venue*. But it is to be observed, that in some cases place is alleged in pleading without reference to the object of determining whence the jurors are to come, and merely to give a reasonable certainty and clearness to the general statement of facts. Thus, where the plaintiff complains of a trespass to his close, or the defendant claims a right of way over the plaintiff's close from one *terminus* to another, the declaration, for greater certainty, must state the name of the close, and of the county or corporation where it is situated, and the plea must set forth the *termini* of the way.

The allegation of *place* in such cases was always necessary in point of due particularity, and as matter of local

description; and it still continues to be so, as indeed the terms of the statute import, notwithstanding the provision already referred to (*ante*, p. 955-'6), declaring that it "shall not be necessary in any declaration or other pleading to set forth the place in which any contract was made, or act done, unless when, from the nature of the case, the place is material or traversable." (V. C. 1873, c. 167, § 8.)

Another provision is contained in the same section, which requires some explanation, namely, that "the allegation may be as to a deed, note, or other writing, *bearing date at any place*, that it was made at such place, or as to any other act, according to the fact, without averring or suggesting that it was at or in the county or corporation in which the action was brought, unless it was in fact therein." (V. C. 1873, c. 167, § 8.) This enactment refers to a requirement of the common law, that even in transitory actions, where the fact is inseparably connected, so far as concerns the proof, with the place where it occurs, (as where an instrument of writing bears date *at a certain place*), the *true place* shall be stated, for the sake of accuracy of description; and if that place differ from the *venue in the action*, in order to reconcile the discrepancy, that there shall be introduced an averment under a *videlicet*, that that place is the venue in the action. Thus, if a bond, or note in writing, on which suit is brought, bears date at "New Orleans," the common law, if the suit were brought in the circuit court for the county of Albemarle, requires that the declaration should aver it to have been made "at the city of New Orleans, in the State of Louisiana, *to wit*, at the said county of Albemarle." (*Shaver v. White*, 6 Munf. 112; *Ante*, p. 592; *Com. Dig. Action*, (N. 7); *Dutch W. Ind. Co. v. Henriques*, 1 Stra. 612.) The statute above cited was designed to supersede the occasion for so awkward a device, and for a phraseology so objectionable.

It remains only to add that, whilst, where the place being not material to the merits, is stated under a *videlicet*, it need not be proved, yet where it is alleged as matter of *description*, it must in all cases, (notwithstanding any *videlicet*) be stated truly and according to the fact, under peril of a variance, if issue should be joined thereon. (St. Pl. 291-'2; *Ante*, 591; 1 Ohit. Pl. 350.)

6<sup>d</sup>. The Doctrine Touching Change of Venue.

It may be added to what was before said touching a change of *venue*, (*Ante*, p. 675-'6,) to which reference is here made, that an application to *change the venue* on the ground that general prejudices exist against the applicant in the county or corporation where the cause is pending, should be supported by the affidavits of disinterested indi-

viduals (*Boswell v. Flockhart*, 8 Leigh, 364); and it is a rule that the notice given to the opposite party must state the ground which is to be assigned for the application. (*Reg. Generalis*, 2 Va. Cas. 88.)

## 2°. RULE II. PLEADINGS MUST HAVE CERTAINTY OF TIME.

In *personal* actions (but not, it is said, in such as are *real* or *mixed*;) the pleadings must, at common law, allege the *time*, that is, the day, month, and year, when each traversable fact, occurred; and when there is occasion to mention a continuous act, the period of its duration ought to be shown. Let us observe, (1), The extent of the rule; and (2), How far the proof must conform to the time stated. (*St. Pl.* 292; 1 Chit. Pl. 287 & seq.)

W. C.

### 1<sup>d</sup>. The Extent of the Rule.

It extends to *traversable facts only*, and not to matter of *inducement or aggravation*; and it will be remembered, that in continuous acts the *period of duration* should be stated. (*St. Pl.* 292; 1 Chit. Pl. 287 & seq; Com. Dig. Pleader, (C. 19).)

### 2<sup>d</sup>. How far the Time Stated must be Proved.

Let us note, (1), The general doctrine applicable to the statement of time; (2), The restrictions upon the pleader's freedom of option in stating it; (3), Where the time is immaterial, and not required to be proved; and (4), That the rule applies only to *personal*, and not to real and mixed actions;

W. C.

### 1°. The General Doctrine applicable to the Statement of Time.

The time, generally, forms *no material part* of the issue, and if stated under a *videlicet*, *need not be proved as laid*. The pleader, therefore, assigns any time he pleases to a given fact, so that it be not on its face *impossible or incongruous*. (*St. Pl.* 292; 1 Chit. Pl. 287 & seq.) Hence, agreeably to a provision of our Virginia statutes, time may, as a general rule, be omitted altogether.

The statute referred to declares, that "all allegations which *are not traversable*, and which the party would *not be required to prove may be omitted*, unless when they are required for the *right understanding* of allegations that are material." (*V. C.* 1873, c. 167, § 10.) This is the *general doctrine*, but the student must observe, that it carries with it the restrictions, presently to be mentioned, or at least two of them, whilst the third restriction is also to be regarded, as will be explained in that connection.

### 2°. Restrictions upon the Pleader's Freedom of Option in Stating the Time.

These restrictions require, (1), That the time should be stated under a *videlicet*; (2), That a time should not be laid which is *intrinsically* impossible or inconsistent with the fact to which it relates; and (3), That the time should not be material to the merits;

W. C.

1<sup>st</sup>. The Time should be Stated under a *Videlicet*.

Whilst our statute in Virginia dispenses with the statement of time altogether, when it is neither directly nor indirectly concerned with the merits. Yet if the pleader chooses to state it, otherwise than under a *videlicet*, it is believed that he will have to prove it, although in itself immaterial. (St. Pl. 293; 1 Chit. Pl. 350; 2 Saund. 291 c, n (1); Skinner v. Anderson, 1 Saund. 169-'70, & n (2); Bishop of Lincoln v. Wolferston, 1 W. Bl. 495.)

2<sup>nd</sup>. Time should not be Laid which is *intrinsically* Impossible, or is Inconsistent with the Facts to which it Relates.

This qualification supposes that the time is not laid under a *videlicet*, for the use of that phrase is a sign that the pleader does not design to bind himself to the proof of the time as averred, and whether it be not true, or intrinsically impossible, or inconsistent with the fact to which it relates, it is alike of no fatal consequence, unless it be material to the merits. But to state a time intrinsically impossible or incongruous would manifest a carelessness which would affect a young pleader's reputation, and it is therefore better to observe the rule as above laid down. (1 Chit. Pl. 288, 350-'51; 3 Saund. 291 c, n (1); St. Pl. 293.)

To aver a time impossible or repugnant when the time is material is a ground of demurrer, but is often aided by the verdict, and almost always cured with us, by the statute of *jeofails*. (St. Pl. 293: Com. Dig. Pleader, (C. 16); 3 Saund. 291 c. n (1).)

Our statute (V. C. 1873, c. 167, § 10,) may be considered as applying to enforce this restriction, for such a mode of stating the time interferes with the *right understanding* of the allegations.

3<sup>rd</sup>. Where the Time is Material to the Merits.

Where the time is material to the merits, it is of the substance of the issue, and must be proved strictly as laid; nor will the insertion of a *videlicet* in such a case give any help. (St. Pl. 293-'4; Grimwood v. Barrit, 6. T. R. 462-'3; Edge v. Stafford, 1 Cr. & Jerv. 394.)

Our statute again enforces this third restriction. The time being supposed to be "required for the *right understanding* of allegations that are material," the statute does

not warrant its omission, and the common law rule here stated requires that it *should be proved as alleged*.

3°. Where the Time is *Immaterial*, and not Required to be Proved.

The pleader in the subsequent pleadings should, in respect to time, *follow the declaration*, (St. Pl. 295; 2 Saund. 5, n (3),) and with us he may, in such subsequent pleadings, omit the time altogether, pursuant to the statute. (V. C. 1873, c. 167, § 10.)

4°. The Rule applies *only to Personal*, not to *Real or Mixed Actions*.

See St. Pl. 295; Id. (Tyler) 281.

3°. RULE III.—PLEADINGS MUST SPECIFY QUALITY, QUANTITY, AND VALUE.

It will be expedient here to distinguish the doctrine in this particular, (1), As respects actions real and mixed; and (2), As respects actions personal;

W. C.

1°. Doctrine in this Particular, as respects Actions Real and Mixed.

Actions real and mixed must specify the *quantity of land* claimed as *by acres, &c.*, and the *quality as being meadow, pasture, arable, &c.*, so that execution may definitely issue therefor. (St. Pl. 296; Harper's Case, 11 Co. 256; Goodtitle v. Walton, 2 Stra. 834; Goodright v. Flood, 3 Wils. 23; Doe v. Ploughman, 1 East. 441; Goodtitle v. Otway, 8 East. 357.)

With us this rule is much and undesirably relaxed. It generally happens that neither quality nor quantity is stated; and some countenance is given to this relaxation by statute, which says, that "the premises claimed shall be described in the declaration (in ejectment) with *convenient certainty*, so that from such description *possession thereof may be delivered*." (V. C. 1873, c. 131, § 8.)

2°. Doctrine in this Particular, as respects *Actions Personal*.

We are under this head to take notice of (1), The general doctrine as respects actions personal; (2), The mode of expressing quantity, quality and value, respectively; (3), The qualification of the general doctrine as to quantity, &c.; (4), When the general doctrine touching statement of quantity, &c. is dispensed with; and (5), How far the proof must conform to the quality, quantity and value, as alleged.

1°. The General Doctrine as respects *Actions Personal*.

For any injury to goods and chattels, and for any contract relating to them, quantity, quality, and value or price, should be stated. (St. Pl. 296-'7; Andrews v. Whitehead, 13 East. 102; Taylor v. Wells, 2 Saund. 74 a, & n (1).)

2°. The Mode of expressing *Quantity, Quality and Value*, respectively; W. C.

1<sup>f</sup>. Mode of expressing *Quantity*.

Quantity is expressed by the ordinary measures of extent, capacity, weight, &c., recognized by law, or if there be no express law, by custom or usage. (St. Pl. 298; *Hockin v. Cooke*, 4 T. R. 316; *Finch's Case*, 6 Co. 67 a.)

2<sup>f</sup>. Mode of expressing *Value*.

Value is expressed by reference to the lawful *current coin of the country*, as in England, by *pounds*, &c.; in Virginia, by *dollars*, &c. (St. Pl. 293; *Kearney v. King*, 2 B. & Ald. (4 \* E. C. L.) 301.)

Hence, where the contract sued on describes the amount by words expressive, not of Virginia currency (that is, dollars, &c., or pounds, &c.) but of foreign money, as so many *pounds sterling, francs, livres, guilders, ducats, pounds Pennsylvania or New York currency*, the plaintiff's demand must be for the numerical amount as stated in the foreign currency in the contract, "of the value of \_\_\_\_\_ dollars, current money of Virginia." But if the contract be for dollars or pounds, which are Virginia currency, nothing more need be said. And formerly by our statutes, (1 R. C. 1819, p. 484) if a contract were payable *in tobacco*, (which was a recognized medium of exchange,) the plaintiff might demand the *tobacco itself* and not the value of it. (3 Tuck. Com. 99, 100; 2 Chit. Pl. 122.)

3<sup>c</sup>. The Qualification of the general doctrine *as to Quantity, Quality, &c.*

A specification of quality and quantity, *in a loose and general way*, is sometimes admitted where great prolixity is thereby avoided, as in case of an action to recover a *library of books*, &c., two or more *packs* of hemp, the keys of a house, &c. (St. Pl. 298-'9; 2 Saund. 74 a, n (1), where many instances are mentioned.)

4<sup>c</sup>. When the general Doctrine touching the Statement of *Quantity, Quality, &c.*, is dispensed with.

The general doctrine regarding a specification of quality, quantity, and value, is dispensed with in modern practice, in respect to actions of debt, and of *indebitatus assumpsit* for goods sold, &c., in order to avoid prolixity. The amount of debt or sum of money due upon such sale, &c., must, however, be shown. (St. Pl. 299, 300.)

5<sup>c</sup>. How far the *Proof* must conform to the *Allegation of Quantity and Value*, and of *Quality*; W. C.1<sup>f</sup>. As respects *Quantity and Value*; W. C.

1<sup>s</sup>. Where the *Allegation* is under a *Videlicet*, and is *not Material* to the *Merits*, nor descriptive of what is *Material*.

Where the averment of quantity or value is un-



der a *videlicet*, and is not material to the merits, nor descriptive of what is *material*, it is not needful that the proof should correspond with the averments. (St. Pl. 300, 301; Rob. Pr. (2nd ed.) 564 & seq; Mowry v. Miller, 3 Leigh, 561; Jackson v. Henderson, 3 Leigh, 196; Taylor v. Bank of Alexandria, 5 Leigh, 471; Purcell v. Macnamara, 9 East. 160; Phillips v. Bacon, 9 East. 298; Phillips v. Shaw, 4 B. & Ald. (6 E. C. L.) 435; Draper v. Garnett, 2 B. Cr. (9 E. C. L.) 2; Bynner v. Russell, 1 Bingh. (8 E. C. L.) 23.)

Hence, it follows with us, (because in general *quantity*, &c., if laid under a *videlicet*, need not be proved), that quantity and value need not be stated at all in such cases, unless required for the right understanding of allegations that are material, as they would be if they were *matter of description*. (V. C. 1873, c. 167, § 10.)

2<sup>d</sup>. Where the Allegation is *Matter of Description*.

In general, where the averment of quantity or value is descriptive of what is material, it is itself material, and must be then proved as alleged. (3 Rob. Pr. (2nd ed.) 567; Purcell v. Macnamara, 9 East. 568; Rubary v. Stevens, 4 B. & Ald. (7 E. C. L.) 630.)

But whilst it is generally true that averments of quantity and value, which are not material to the merits, nor descriptive of what is material, if stated under a *videlicet*, need not be proved, it must be observed that, for the most part, *a verdict cannot be obtained for a larger quantity or value than is alleged*. The pleader, therefore, must take care to lay them to an extent large enough to cover the utmost case that can be proved. (St. Pl. 300.)

Yet, with us, this proposition must be received, at least in respect to damages laid in the conclusion of the declaration, with some qualification. Thus, if the verdict be rendered for damages greater than are laid in the declaration, if they do not exceed those *laid in the writ*, the latter may be looked to in order to *sustain* the verdict and proceedings; although the writ could not with-out *oyer*, be referred to in order to overthrow them. (Hood v. Turnbull, 6 Call. 85; Diggs v. Norris, 3 H. & M. 268; Tennant's Ex'ors v. Gray, 5 Munf. 494; Claud v. Campbell, 4 Munf. 214.) If, however, the damages found by the jury exceed those laid either in the writ or the declaration, if it is discovered before the jury are discharged, they may be sent back to qualify their verdict; if not discovered until the jury are discharged, but during the same term of the court, a new trial must be awarded at the defendant's instance, unless the plaintiff will *release*

*the excess*; and if not discovered until the term of the court is ended, the judgment must at common law be reversed upon writ of error; and the plaintiff could not prevent that result by any release which he could make of the excess. (*Cloud v. Campbell*, 4 Munf. 214; *Cahill v. Pintony*, 4 Munf. 371.) By the statute of jeofails and amendments, however, the plaintiff is allowed to cure such an error by a release of the excess, even at a subsequent term of the court, by entry of record, or *in vacation* by writing signed by him, and attested by the clerk. (V. C. 1873, c. 177, § 5.)

2<sup>d</sup>. As respects *Quality*.

Quality generally requires to be *strictly proved* as laid, because it usually is *matter of description*. (St. Pl. 301, (Tyler) 284.)

4<sup>c</sup>. RULE IV.—PLEADINGS MUST SPECIFY THE NAMES OF PERSONS.

This rule applies to, (1), The parties to the action; and (2), Third persons who are not parties;  
W. C.

1<sup>d</sup>. Specification of Names of *parties to the Action*; W. C.

1<sup>e</sup>. The Particulars wherein the Designation consists.

The designation of any person consists in the particulars of the name of baptism, or Christian name, of the surname, and of the name of dignity, if any; and a mistake in any of these particulars is called a *misnomer*. (St. Pl. 301-2; *Ante*, p. 573-4.)

It need hardly be said that names or titles of dignity, to whatever ridiculous extent the love and employment of them may be carried into social life, have in the United States no legal existence.

As to what constitutes a mistake in a party's name, see Com. Dig. Abatement, (E. 18) to (E. 23), and (F. 17) to (F. 26); 1 Chit. Pl. 279; *Lindsay v. Wells*, 3 Bingh. N. C. (22 E. C. L.) 777; *Rust v. Kennedy*, 4 M. & W. 586; *Taylor's Case*, 20 Grat. 825; *O'Bannon v. Saunders*, 24 Grat. 146.)

The misspelling of a name is not a *misnomer* if it has the same sound as the true name. (*Williams v. Ogle*, 2 Stra. 889; *Ahitbol v. Beniditto*, 2 Taunt. 401; *King v. Shakespeare*, 10 East. 83.) Nor is the omission of the designation *junior*, which is no part of the name. (Bac. Abr. Misnomer, (B) 1; *O'Bannon v. Saunders*, 24 Grat. 146.) But the inversion of two Christian names of baptism, as *Richard James*, instead of *James Richard*, is a misnomer. (Com. Dig. Abatement, (E. 18); *Jones v. Macquillin*, 5 T. R. 195.)

2<sup>e</sup>. The Mode of Taking Advantage of a *Misnomer*.

At common law a misnomer is taken advantage of by a *plea in abatement*. In Virginia, by statute taken from and corresponding to 3 & 4 Wm. IV, c. 42, no plea in abatement for misnomer is allowed in any action; but the declaration on the defendant's motion, and on affidavit of the right name, is amended by inserting the right name. (V. C. 1873, c. 167, § 18; St. Pl. 302; Wells v. Suffield, 4 Man. Gr. & Sc. (56 E. C. L.) 750; 3 Rob. Pr. (2nd ed.) 519.)

3°. Reason why *no Misnomer* ought to be allowed to occur in Declaration.

The reason why a misnomer of either plaintiff or defendant is liable to objection is because the record would then afford no protection to the *defendant* against a subsequent suit for the same cause of action. The expedient, however, of inserting the right name on the motion, and on the affidavit of the defendant, accomplishes this purpose without delay, and with perfect efficiency, and is therefore a truly valuable improvement.

2<sup>d</sup>. Specification of the Names of *Third Persons, not parties*; W. C.

1°. How far the Names of Third Persons, not parties, are Required to be Stated.

A mistake in the name of a party to the suit cannot be objected as a variance at the trial; but the name of a person *not a party*, is a point on which the proof must correspond with the averment, under peril of a variance fatal, until amended. Thus, where a bill of exchange, drawn by John Couch, was declared upon as drawn by John Crouch, and the defendant pleaded the general issue, the plaintiff was defeated. (Whitwell v. Bennett, 3 Bos. & Pnl. 560, 562. See also Bowditch v. Mowley, 1 Campb. 195; Hutchinson v. Piper, 4 Taunt. 814; St. Pl. 303.)

2°. Mode of Taking Advantage of a Mistake in the *name of Third Persons*.

A mistake in the name of third persons is to be taken advantage of in the same way as any other variance, of which an explanation has been already given. (*Ante*, p. 733.) The effect of a material variance, and the mode of obviating the effect by amendment, has also been explained in another place, to which the student is advised now to refer. (*Ante*, p. 733-'4. See V. C. 1873, c. 173, § 1.)

Before passing away from this rule, as to the statement of names, it will be proper to recall to the student's memory the manner of declaring upon a writing (say a bond), signed by a party by other than his true name; as for example, where the name of a *firm* is attached to a

bond by one of the partners, without authority under seal, or the personal presence and authorization of the other partners, we have seen that it is not the bond of the firm, but only of the *individual partner* who affixed the signature. The suit, then, is to be instituted against him, in his right name, and the bond is to be described thus: "Sealed with his seal, and to the court now here shown, the date whereof is the day and year aforesaid, acknowledged himself, by the name of D. D. & Co. (by which name, as well as by the name of D. D., the said defendant is called and known), to be held and firmly bound," &c. (Williams v. Bryant, 5 Mees. & W. 447; Reeves v. Slater, 7 B. & Cress. (14 E. C. L.) 486, 490; 1 Greenl. Evid. § 69, n 3; *Ante*, p. 573, 574.)

5°. RULE V.—THE PLEADINGS MUST SHOW TITLE.

When, in pleading, any right or authority is set up in respect of property, personal or real, some *title* to that property must of course be alleged in the party, or in some other person from whom he derives his authority. And so if a party be charged with any *liability* in respect of property, personal or real, his *title* to that property must be alleged. (St. Pl. 304; Com. Dig. Pleader, (3 M. 9); Pearle v. Bridges, 3 Saund. 401 a, & n (1).)

This doctrine is sometimes spoken of as if it were *confined* to the declaration, of which it is indeed true that it must state such a case as entitles the plaintiff to recover, as by showing by proper averments, that he had a right of action at the *commencement of the suit*; as that a promise not under seal is founded on a *valuable consideration*; that in *trover* there was a conversion; that a *condition precedent* has been *performed*, &c. (Gould's Pl. c. 4, § 7 & seq; Bac. Abr. Pleas. &c. (B.) 5, 1; Com. Dig. Pleader, (C. 34) & seq.) But the rule is alike applicable to all pleadings, although it will seldom be exemplified in any but declarations and pleas. One anomalous exception to the otherwise universal principle that the plaintiff cannot recover unless his declaration contains averments setting forth *the gist of the action*, is insisted upon in one or more cases of authority, namely, that it is not needful in an action for malicious prosecution to allege the *want of probable cause*. (Jones v. Givin, Gilb. Cas. 201; S. C. 10 Mod. 214.) But in Virginia the contrary is the established doctrine, and as our judges conceive, the doctrine in England also. (Ellis v. Thilman, 3 Call. 5; Young v. Gregorie, Id. 452 & seq; Kirtley v. Deck, 2 Munf. 20, 21 & seq.)

Let us examine the doctrine as to alleging title to *property*, (1), Where the party alleges such *title in himself*, or *in another whose authority he pleads*; and (2), Where he alleges it *in his adversary*; and then note (3), The proof to be made of

the title alleged; and (4), The exceptions to the general rule requiring that title should be shown;

W. C.

- 1<sup>d</sup>. The Doctrine as to alleging Title where the Party *alleges it Himself*, or in another whose Authority he Pleads.

In this case the title must, for the most part, be fully and particularly alleged, inasmuch as it cannot but be well known to the pleader; whilst the adversary's title, with which he will probably be in general but imperfectly acquainted, is allowed to be stated generally.

We may advert to (1), The manner of alleging title; (2) The extent of accuracy with which it must be set forth; and (3), The rules respecting the derivation of title;

W. C.

- 1<sup>o</sup>. The Manner of *alleging Title in Oneself*, &c.

There are certain forms used in pleading appropriate to each different kind of title, according to all the distinctions as to the *kind* and *quantity* of estate, the *time of enjoyment* as in *presenti*, or in *futuro* by way of remainder, &c., the *number* of owners, and the *manner of derivation or acquisition*. These forms *must* substantially be observed, and it would be wise, in general, to follow them literally, with such adaptations as the differences in our situation and laws call for. They are too various to be even illustrated here, and it will be necessary to refer the student to the copious store of them collected in 2 Chit. Pl. 560 & seq.

One case, however, it may be expedient to mention, namely, where a *prescriptive* right is claimed to an easement, or to any profit or benefit taken or arising out of land, such as a prescriptive right of way or of common. It is required in that case to allege a seisin in fee of the close or other corporeal hereditament in respect of which the right is claimed, and then to prescribe for it in a *que estate*; that is, to allege that the person so seised, and all those whose estate he has in the premises, has from time immemorial, exercised the right in question. (St. Pl. 305; 1 Saund. 346, & n (2); Atto. Gen. v. Gauntlett, 3 Yo. & Gerr. 98-'9; Grimstead v. Marlowe, 4 T. R. 718.)

- 2<sup>o</sup>. The *Extent of Accuracy* with which a Title in Oneself, &c., must be Set Forth.

The leading distinction with respect to the particularity and accuracy with which the title must be stated, is between, (1), Estates in *fee-simple*; and (2), *Particular estates*; that is, estates less than fee-simple;

W. C.

- 1<sup>t</sup>. The Doctrine as to the Accuracy with which a Title in Fee-Simple must be Stated.

We must here distinguish between, (1), The general

doctrine; and (2), The doctrine where seisin has been previously alleged in another;

W. C.

1<sup>st</sup>. The General Doctrine in Case of Fee-Simple Estates.

In general, in setting forth a title in fee-simple, it is sufficient to state merely a *seisin in fee-simple* in the party, according to the usual form of alleging that title, namely, that the party was "seised in his demesne as of fee, (or as we should say, *seised in fee-simple*, 2 Insts. Com. & Stat. Law, 73, 74,) of and in a certain messuage," &c., without showing the *derivation*, or (as it is expressed in pleading,) the *commencement* of the estate. (St. Pl. 306; 3 Th. Co. Lit. 413; Scavage v. Hawkins, 4 Cro. (Car.) 571.) For if it were requisite to show from whom the present tenant derived his title, it might be required with equal reason to show from whom that person derived *his*, and so *ad infinitum*. So, though the fee be *conditional* or *determinable* on a certain event, yet a seisin in fee may be alleged without showing the commencement of the estate. (St. Pl. 307.)

2<sup>nd</sup>. The Doctrine where Seisin has, in the Course of the Pleading, been *previously Alleged in another*.

Where, in the course of the pleading, the seisin has already been alleged in another person, from whom the present party claims, it must of course be shown how it passed from one of these persons to the other. Thus, in an action of debt or covenant brought on a deed of lease by the heir of the lessor, the plaintiff having alleged that his ancestor was seised in fee, and made the lease, must proceed to show how the fee passed to himself, viz: *by descent*. For example, C. C., the son and heir of J. C., deceased, brings an action of covenant against D. D. for non-payment of rent, upon a deed of lease made by J. C. in his life-time to D. D. He states J. C.'s seisin in fee, and that, being so seised, he demised the lands to D. D. at a certain rent, for a term not yet ended, and afterwards died seised of the reversion in the premises, and then proceeds to *derive* his title by descent from his father. "After whose decease (that is, J. C.'s,) the said reversion descended to the said plaintiff, as the only child and sole heir of the said J. C., whereby the said plaintiff was seised of the reversion of the said demised premises in his demesne as of fee, [or more properly, with us, *in fee-simple*]. And the said plaintiff in fact says, that he, the said plaintiff, being so seised, and the said defendant being so possessed as aforesaid," a large sum of money became due for rent. &c. (St. Pl. 167, 307.)

So if, in trespass, the defendant plead that E. F., being seised in fee, demised to G. H., under whose command the defendant justifies the trespass on the land (giving color), and the plaintiff in his replication admits E. F.'s seisin, but sets up a subsequent title in himself to the same land in fee-simple, prior to the alleged demise, he must show the derivation of the fee from E. F. to himself, by conveyance antecedent to the lease under which G. H. claims. (St. Pl. 307; 9 Wentw. Pl. Index, xl, xli.)

2<sup>d</sup>. Doctrine in Case of *Particular Estates*.

In respect to the rule for setting out the title to *particular estates*, we must observe, (1), The general rule; and (2), The doctrine where the title is stated as matter of inducement;

W. C.

1<sup>st</sup>. The General Doctrine as to the *Statement of Title to Particular Estates*.

The general rule is that the *commencement of particular estates must be shown*. (St. Pl. 308; 3 Th. Co. Lit. 413; Scilly v. Dally, 2 Salk. 562; Johns v. Whitley, 3 Wils. 72.) If, therefore, a party sets up in his own favor an estate for life, for years, or at will, he must show the derivation of that title from its commencement; that is, from the last seisin in fee-simple; and if derived by alienation or conveyance, the substance and effect of such conveyance should be precisely set forth. (St. Pl. 308.)

2<sup>d</sup>. The Doctrine as to the Mode of Stating the Title when *it is alleged by way of Inducement*.

Where the title is stated merely by way of *inducement*, the commencement, even of *particular estates*, need not be shown. (Com. Dig. Pleader, (E. 19), (E. 10), (C. 43); St. Pl. 309.) Thus, if an action of debt or covenant be brought on a deed of lease, by the executor of a lessor, who had been entitled for a term of years, it is necessary in the declaration to state the title of the lessor, in order to show that the plaintiff is entitled to maintain the action as his representative. But as the title is in that case alleged by way of inducement only, and cannot come in question, (the action being mainly founded on the lease itself,) the particular estate for years may be alleged in the lessor, without showing its commencement. (St. Pl. 310; Com. Dig. Pleader, (C. 43); Searl v. Bunion, 2 Mod. 70; Skevill v. Avery, 4 Cro. (Car.) 138; Lodge v. Frye, 3 Cro. (Jac.) 52.)

3<sup>d</sup>. Rules respecting the *Derivation of Title*.

The topics to be discussed under this head will include,

(1), The rules respecting the derivation of title where the party claims by descent; (2), Where he claims by purchase; (3), That a conveyance must be stated according to its legal effect, rather than its form of words; (4), That conveyances existing *at common law* must be stated according to common law requirements; and (5), That in certain cases less precise allegations of title are admissible;  
W. C.

1<sup>f</sup>. The Rules respecting the Derivation of Title *where the party claims by Descent.*

Where a party claims *by inheritance or descent*, he must in general *show how he is heir*, viz: as son or otherwise; and if he claims *by mediate, not immediate descent*, he must *show the pedigree*; for example, if he claims as nephew, he must show how nephew. Thus, having averred that the ancestor, S. B. was seised of the lands in question, in his demesne, as of fee and right, (or, with us, *in fee-simple and in right*), he would proceed to state that the said S. B. died seised, and without issue; and that upon his death, the right to the land, with the appurtenances "descended and came to the said J. D. (the party pleading), who was the son, and only child of R. B., then deceased, who in his lifetime was the brother of the said S. B., and died before him, which said J. D. was the nephew and heir of the said S. B." (2 Saund. 45 e; 10 Wentw. Pl. 214; 2 Chit. Pl. 571 & seq; Dumsday v. Hughes, 3 Bos. & Pul. 453; Blackborough v. Davis, 12 Mod. 619.)

2<sup>f</sup>. The Rules respecting the Derivation of Title *where the Party claims by Purchase.*

Where a party claims *by conveyance or alienation* the nature of the conveyance and alienation must in general be stated, as *whether it be by devise, feoffment, grant, lease, bargain and sale, &c.* (2 Chit. Pl. 573 & seq; 2 Saund. 9 c, & n (13), 20; St. Pl. 310-'11.)

3<sup>f</sup>. The Conveyance or Mode of Alienation must be stated *according to its Legal Effect rather than its Form of Words.*

This depends upon a more general rule, which will be considered in another place, viz: "that things are to be pleaded *according to their legal effect or operation.*" For the present the doctrine, as applicable to conveyances, may be thus illustrated: In pleading a conveyance *for life* with livery of seisin, the proper form is to allege it as a "*demise*" for life, for such is its effect in proper legal description. So a conveyance of the fee simple with livery is described by the term "*enfeoffed.*" (St. Pl. 311; 2 Chit. Pl. 573, &c.) And such would be the form of



pleading, whatever might be the *words* of donation used in the instrument itself which, in all the three cases, are often the same, viz: those of "give" and "grant." (St. Pl. 311-'12; 2 Insts. Com. & Stat. Law, 670.) So in a conveyance by lease and release, though the words of the deed of release be "grant, bargain, sell, release and confirm," yet it should be pleaded as a *release* only, for that is the legal effect. And a surrender (whatever words are used in the instrument), should be pleaded with *sursum reddidit*, (surrendered) which alone in pleading describes the operation of a conveyance as a *surrender*. (St. Pl. 312; 1 Saund. 235 b, n (9); 2 Saund. 97 & n (1) and (2); 2 Chit. Pl. 573 & seq.)

4<sup>f</sup>. Conveyances not arising out of Statutes are to be stated *according to the Requirements of the Common Law*.

Where the common law requires no *deed or writing*, (as in the case of a feoffment or other conveyance of a *freehold* with livery of seisin,) none need be averred in pleading, notwithstanding the statute of frauds (29 Car. II, c. 3, § 1, 2, 3); and our statute of conveyances (V. C. 1873, c. 112, § 1), *require a deed*; for it is a general rule that regulations introduced by statute do not alter the form of pleading at common law. But where the common law requires a deed, (as in the case of a release from one joint-tenant to another, or of a grant of incorporeal property,) there a deed must be averred. And when the conveyance is statutory, as by will, or under the statutes of uses or of grants, the conveyance must be alleged to be in that form in which the statute on which it depends shall authorize it to be made. Thus, a devise must be averred to be *in writing*, and a conveyance under the statute of uses or of grants must be shown to be *by deed*. (2 Insts. Com. & Stat. Law, 407, 671, 701, 744, 913; 2 Th. Co. Lit. 453, 513-'14, n (T. 3))

There is, however, one case in which it is usual in pleading to allege a deed, though not necessary at common law, to the conveyance, and which, therefore, in practice at least, forms an exception to the above rule. For in making title under a lease for years by indenture, the indenture is commonly pleaded, notwithstanding the lease was good at common law, by parol, and needs to be in writing only where the term in England exceeds three years, and with us where it exceeds five, and then only by the statute 29 Car. II, c. 3, and our corresponding statute of conveyances. (V. C. 1873, c. 112, § 1; 2 Chit. Pl. 574; 1 Saund. 187, 203, n (1).)

On the other hand, in the case where a demise by husband and wife of the wife's land is pleaded, it seems that

it is not necessary, independently of statute, to show that it was by deed; and yet the lease, if without deed, is at common law void as to the wife, after the death of the husband. The reason seems to be, that such lease, though without deed, is at common law good during the husband's life. (St. Pl. 314; 2 Saund. 180 a, n (9); Bac. Abr. Leases, (C) 1; Wiscot's Case, 2 Co. 61 b, & n (M); Bateman v. Allen, 1 Cro. (Eliz.) 438; Childes v. Wescott, 2 Cro. (Eliz.) 482.) At present, in Virginia, all the real and personal property of any female who marries after 4th April, 1877, which she owns at the time of her marriage, and any property acquired by a married woman as a *separate and sole trader*, shall be her separate and sole property, not subject to the disposal of her husband, nor liable for his debts; and she has power to contract in relation thereto, or for the disposal thereof, and may sue and be sued as if she were a *feme sole*, provided that her husband shall join in any contract in reference to her real or personal property, other than such as she may acquire as a sole trader; and shall be joined with her in any action by or against her. (Acts 1876-'7, p. 333, c. 329.) This provision may throw not a little doubt upon the proposition stated above, inasmuch as it disables the husband alone to dispose of the wife's lands at all.

5<sup>f</sup>. In Certain Cases *less precise Allegations of Title are admissible*.

The certain excepted cases in which different and less precise modes of laying title are permitted, may be classed as follows, (1), Those where it is sufficient to allege a *general freehold title*; and (2), Those where it is sufficient to allege a *title of mere possession*;

W. C.

1<sup>a</sup>. Cases where it is Sufficient to allege a *General Freehold Title*.

In a plea in trespass *quare clausum fregit*, or an avowry in replevin, and also in an assize, (but it is believed in no other cases,) if the defendant claim an estate of freehold in the *locus in quo*, he is allowed to plead generally that the place is his "*close, soil, and freehold*." This is called the plea or avowry of *liberum tenementum*. (3 Chit. Pl. 1098, 1058; Com. Dig. Pleader, (3 M. 34); Elwis v. Lombe, 6 Mod. 119; Pell v. Garlick, 12 Mod. 508; 1 Saund. 347 d, n (6).) As replevin has been abolished in Virginia, (V. C. 1873, c. 145, § 4,) and assize is out of use, the illustration of the plea of *liberum tenementum*, which is usually accompanied by the plea of not guilty, may be limited to the action of trespass *quare clausum fregit*.

## PLEA OF LIBERUM TENEMENTUM,

*In trespass quare clausum fregit.*

[*Omitting title of court and rules.*] And for a further plea in this behalf as to the breaking and entering of the said close, in which, &c., in the said declaration mentioned; and with feet in walking, treading down, trampling upon, consuming and spoiling the grass and herbage then and there growing, the said defendant says that the said plaintiff ought not to have or maintain his action aforesaid thereof against him, because he says that the said close in the said declaration mentioned, and in which, &c., now is, and at the several times when, &c., *was the close, soil, and freehold* of him, the said defendant. Wherefore he, the said defendant, at the said several times when, &c., broke and entered the said close, in which, &c., and with feet in walking, trod down, trampled upon, consumed, and spoiled the grass and herbage then and there growing, as he lawfully might for the cause aforesaid, which are the same trespasses in the introductory part of this plea mentioned, and whereof the said plaintiff hath above complained. And this the said defendant is ready to verify. Wherefore he prays judgment, if the said plaintiff ought to have or maintain his action aforesaid thereof against him. [8 Chit. Pl. 1098, 1058.]

This averment of a general freehold title will be sustained by proof of *any* estate of *freehold*, whether in fee or for life only, and whether in possession or expectant on the determination of a *term for years*. But it does not apply to the case of a freehold estate in remainder or reversion expectant on a particular estate of *freehold*. (St. Pl. 315-16.)

The plea of *liberum tenementum* (which is generally denominated the *common bar*), may appear at first sight to be opposed to principle, as giving *no color* to the plaintiff. It is obvious, however, that it is not open to this objection; because, though it asserts the *freehold* to be in the defendant, it does not exclude the possibility of the plaintiff's being possessed of the premises for a *term of years*; and it leaves him, therefore, a sufficient color to maintain the action. And so also it would be if the plea were that the defendant was *seised in fee*. (St. Pl. 316; 1 Chit. Pl. 542.) But (as we have elsewhere seen) a plea that J. S. was seised in fee, and demised to the defendant *for years*, is bad for want of color, unless express color be given. (St. Pl. 317; *Ante*, p. 650, 910.)

In alleging a general freehold title, it is not necessary to show its *commencement*, as is seen from the example given above. (St. Pl. 318.)

2<sup>d</sup>. Cases where it is sufficient to *allege a Title of Mere Possession*.

Let us observe, (1), In what cases a title of mere possession is applicable; (2), The form of laying a title of possession; and (3), The proof to sustain a title of possession;

W. C.

1<sup>h</sup>. In what Cases a Title of Mere Possession is Applicable.

We are here to take notice of, (1), The general doctrine upon the subject; and (2), The exceptions to the general doctrine.

1<sup>i</sup>. The General Doctrine as to where a Title of mere Possession is Applicable.

The general rule on this subject is, *that it is sufficient to allege possession merely as against a wrong doer*; or, in other words, that it is enough to lay a title of possession against a person who is stated to have committed an injury to such possession, having as far as it appears, no title himself. (Com. Dig. Pleader, (C. 39), (C. 41); 3 Rob. Pr. (2nd ed.) 414 & seq. 228; Birt v. Strode, 12 Mod. 98; Greenhow v. Ilsley, Willes, 619; Taylor v. Eastwood, 1 East. 212; Waring v. Griffiths, 1 Burr. 444.) Thus, if the plaintiff declares in trespass, for breaking and entering his close, or in trespass on the case, for obstructing his right of way, it is enough to allege in the declaration, in the first case, that it is the "close of the plaintiff," and in the second case that "he was possessed of a certain messuage, &c., and by reason of such possession, of right ought to have had a certain way," &c. For if the case was that the plaintiff being possessed of the close, the defendant having himself no title, broke and entered, or that the plaintiff being possessed of a messuage and right of way, the defendant being without title, obstructed it, then whatever was the nature and extent of the plaintiff's title in either case, the law will give him damages for the injury to his possession; and it is, therefore, the *possession only* that needs to be stated. It is true that it does not yet appear that the defendant had no title, and by his plea, he may possibly set up one superior to that of the plaintiff; but as, on the other hand, it does not yet appear that he *had* title, the effect is the same; and till he pleads, he must be considered as a mere *wrong-doer*; that is, he must be taken to have committed an injury to the plaintiff's possession without having any right himself. (St. Pl. 319-'20.)

Again, in an action of trespass for assault and battery, if the defendant justifies on the ground that the plaintiff wrongfully entered his house, and was making a disturbance there, and that the defendant gently removed him, the form of the plea is, that "the defendant was *lawfully possessed* of a certain dwelling-house,

&c., and being so possessed the said plaintiff was unlawfully in the said dwelling-house," &c., and it is not necessary for the defendant to show any title to the house beyond this of mere possession. (St. Pl. 320; 3 Chit. Pl. 1073-'4; 4 Rob. Pr. 619; Skevill v. Avery, 4 Cro. (Car.) 138-'9.) For the *plaintiff* has, at present, set up no title at all to the house, and on the face of the plea he appears to have committed an injury to the defendant's possession, without having any right himself.

So, in an action of trespass for seizing cattle, if the defendant justifies on the ground that the cattle were trespassing on his close, it is not necessary for him to show any title to his close, except that of *mere possession*. (St. Pl. 321; 1 Saund. 221, n. (1); 3 Saund. 284 e, n. (3); Anon. 2 Salk, 643; Searl v. Bunion, 2 Mod. 70; Langford v. Webber, 3 Mod. 132; Hawkins v. Eckles, 2 Bos. & Pul. 361, n. (a).)

2<sup>d</sup>. The *Exceptions to the General Doctrine* that a Title of mere Possession is Applicable against a Wrong-doer.

These exceptions seem, at common law, to embrace two cases, namely: (1), Replevin; and (2), Real and mixed actions;

W. C.

1<sup>st</sup>. *Doctrine as to Averring a Title of mere possession in Replevin.*

In replevin it is held not to be sufficient to state a title of mere possession, even in a case where it would be allowable in trespass, by virtue of the general rule above discussed. Thus in replevin, if the defendant, by way of avowry, pleads that he was possessed of a messuage, and entitled to common of pasture as appurtenant thereto, and that he took the cattle in question *damage fasant*, it seems that this pleading is bad; and that in this action it is not sufficient to lay such title of mere possession, because, it is said, the title is involved in the merits, forasmuch as the avowant does not seek merely to excuse a wrong imputed to him (as in the cases of the trespasses we have been considering), but to have the chattels replevied *returned to him*. (St. Pl. 321-'2; 3 Saund. 284 e, n. (3); Butts' Case, 7 Co. 25 a; Goodman v. Aylin, Yelv. 148; Scilly v. Dally, 2 Salk. 562; Saunders v. Hussey, 1 Ld. Raym. 332; Matthews v. Carew, 1 Salk. 107; Hawkins v. Eckles, 2 Bos. & P. 360-'61; & n. (a).)

The action of replevin, it will be remembered, is abolished in Virginia, so that this first exception

practically is of no importance here. (V. C. 1873, c. 145, § 4.)

2<sup>k</sup>. Doctrine as to averring *Title of Mere Possession in Real and Mixed Actions.*

Title of mere possession is seldom allowable in *real or mixed actions*, for in these an injury to the possession is seldom alleged; the question in dispute being, for the most part, on the *right of possession*, or the *right of property*. (St. Pl. 322.)

2<sup>h</sup>. The form of laying a Title of Possession.

It will tend to clearness if we examine the form of laying a title of possession in respect of (1), Goods and chattels; (2), Corporeal hereditaments; and (3), Incorporeal hereditaments;

W. C.

1<sup>l</sup>. The Form of laying a Title of Possession in *Respect of Goods and Chattels.*

The form is either to allege that they were "the goods and chattels of the plaintiff" or other party pleading; or that the party pleading "was lawfully possessed of them as of his own property." Thus, in a declaration in *trover*, the plaintiff alleges that he "was lawfully possessed as of his own property of certain goods and chattels, to wit," &c. And in *detinue*, the averment may be in terms nearly similar, or describes the chattels as "certain goods and chattels of the said plaintiff of great value, to-wit of the value," &c. St. Pl. 317, 41; 2 Chit. Pl. 835, 593.)

2<sup>l</sup>. The Form of laying a Title of Possession in *Respect of Corporeal Hereditaments.*

The form in this case is either to allege that the close, &c. "was the close of the plaintiff" or other party pleading, or that he was "lawfully possessed of a certain close, &c. Thus, in an action of trespass, *quare clausum fregit*, the plaintiff avers in his declaration that the defendant with force and arms broke and entered "the close of the said plaintiff," that is, a certain close called, &c. And in an action of trespass on the case for injury to land otherwise than by trespassing on it, the averment is that the "plaintiff hitherto hath been and still is lawfully possessed of a certain close," or "of a certain messuage or dwelling house, with the appurtenances, situate," &c. (St. Pl. 317, 39; 2 Chit. Pl. 863, 769.)

3<sup>l</sup>. The Form of laying a Title of Possession in *respect of Incorporeal Hereditaments.*

With respect to incorporeal hereditaments a title of possession is generally laid by alleging that the

plaintiff was possessed of the corporeal thing in respect of which the right is claimed, and by reason thereof was entitled to the right at the time in question; for example, that he "was possessed of a certain messuage, &c., and by reason thereof, during all the time aforesaid, of right ought to have had common of pasture," &c. (St. Pl. 318; 2 Chit. Pl. 800.)

3<sup>h</sup>. The Proof required to sustain a Title of Possession.

A title of possession will be sufficiently sustained in all cases where it is applicable by proof of a present and immediate interest. Thus, when a title of possession is alleged with respect to *goods and chattels*, the statement will be supported by any kind of *present interest* in them, whether that interest be temporary and special, like that of a common carrier, or finder, or absolute in its nature, like that of an owner or proprietor. (St. Pl. 318; 2 Saund. 47 a, n (1).)

So, where a title of possession is alleged in respect of *corporeal or incorporeal hereditaments*, it will be sufficiently maintained by proving any kind of *estate in possession*, whether fee-simple, for life, for term of years, or otherwise. (St. Pl. 318.)

On the other hand, with respect to any kind of property, a title of possession is not sustained in evidence by proof of an interest in *remainder or reversion* only; and therefore, when the interest is of that description, the preceding forms are inapplicable, and title must be laid *in remainder or in reversion*, according to the fact. (St. Pl. 319; 2 Chit. Pl. 568; 1 Saund. 250 e; 3 Saund. 235, & n (2).)

2<sup>d</sup>. The Doctrine as to Alleging Title where the Party *Alleges it in his Adversary*.

Where a party alleges title *in his adversary*, the rule appears in general to be, that *it is not necessary to allege title more precisely than is sufficient to show a liability in the party charged, or to defeat his present claim*; notwithstanding, if the same person were pleading in *his own title* a precise allegation thereof would be necessary. The reason of this difference is, that a party must be presumed to be ignorant of the particulars of his adversary's title, though he is bound to know his own. (St. Pl. 322; Com. Dig. Pleader, (C. 26); Cotes v. Wade, 1 Lev. 190; Rider v. Smith, 3 T. R. 768; Derisley v. Custance, 4 T. R. 77.)

To answer the purpose of showing a liability in the party charged, according to the rule just stated, it is in most cases sufficient to allege a *title of mere possession*. If, however, the interest of the adversary be *not a present interest*, or if mere possession is not sufficient to *show his liability*, more

precision is required in setting forth his title. Let us therefore inquire, (1), When a *title of mere possession* in the adversary is sufficient; (2), The mode of alleging title in the adversary when his interest is by way of reversion or remainder; and (3), The mode of alleging title in the adversary, when a title of mere possession is not sufficient to show his liability;

W. C.

1°. When a *Title of mere possession in the Adversary is Sufficient.*

A title of mere possession in the adversary is in most cases sufficient, as we have seen; but it can be sustained in evidence only by proving some *present interest* in chattels, or *actual possession* of land. The forms of alleging a title of possession in the adversary are similar to those in which the same kind of title is alleged in favor of the party pleading. (*Ante*, p. 977, 978.) If there be no present interest in chattels, nor actual possession of lands, or if the mere possession is not attended with the liability sought to be charged, more precision must be observed. (St. Pl. 323.)

2°. The Mode of Alleging Title in the Adversary when *his Interest is by way of Reversion or Remainder.*

Where the interest of the adversary is by way of reversion or remainder, the title of possession being inapplicable, it must be described in like manner as we have seen such a title is alleged in favor of the party pleading. (*Supra*, p. 978.)

3°. The Mode of Alleging Title in the Adversary when a *Title of mere possession is not Sufficient to show his Liability.*

Where a title of mere possession is not sufficient to show the adversary's liability, although more particularity must be employed than that sort of title requires, it is still not necessary to allege the title of an adversary with as much precision as in the case where a party is stating his own, and it seems sufficient that it be laid fully enough to show the liability charged. (Com. Dig. Pleader, (C. 42); St. Pl. 324; *Hill v. Saunders*, 4 B. & Cr. (10 E. C. L.) 529.) Hence, although it is the rule, as we have seen, with respect to a man's own title, that the *commencement of particular estates should be shown*, unless alleged by way of *inducement*, (*Ante*, p. 970), yet in pleading the title of an adversary, it seems that this is in general not necessary, (St. Pl. 324; *Blake v. Foster*, 8 T. R. 496); but that it suffices to set it forth with much less precision than when one alleges his own. Thus, it is enough in general, to plead such a title by a *que estate*;



that is, to allege that the opposite party has the same estate as has been precedently laid in some other person, without showing in what manner the estate passed from the one to the other. (St. Pl. 324; Com. Dig. Pleader, (E. 23), (E. 24); 3 Bl. Com. 264; 1 Saund. 346, n (2).) Thus, in debt, where the defendant is charged for rent as the assignee of the term after several mesne assignments, it is sufficient, after stating the original demise, to allege that "after making the said indenture, and during the term thereby granted, to wit, on the — day of —, in the year —, all the estate and interest of the said E. F.," (the original lessee,) "of and in the said demised premises, came to and vested in the said defendant," without further showing the nature of the mesne assignments. (St. Pl. 325; 1 Saund. 112 a, n (2); Cotes v. Wade, 1 Lev. 190; Derisley v. Custance, 4 T. R. 77.) But if the case be reversed, that is, if the plaintiff claiming as assignee of the reversion sues the lessee for rent, he must precisely show the conveyances, or other *media* of title, by which he became entitled to the reversion, and to say, in general terms, that it came to him by assignment, will not be sufficient, without circumstantially alleging all the mesne assignments. (1 Saund. 112 a, n (2); 2 Chit. Pl. 564-5, & n (b); 552 c, & n (n).)

Upon the same principle, if title be laid in an adversary by descent, as for example, where an action of debt is brought against an heir on the bond of his ancestor, it is sufficient to charge him as *heir*, without showing *how* he is heir, viz, as son or otherwise; but if a party entitle *himself* by inheritance, we have seen that the *mode of descent* must be alleged. (St. Pl. 326; *Ante*, p. 971; Denham v. Stephenson, 1 Salk. 355.)

3<sup>d</sup>. The Doctrine as to the *Proof to be made of the Title alleged in Pleading.*

The title shown in pleading must in general, when issue is taken upon it, be *strictly proved*. *Time, quantity, and value* we have seen, do not usually require to be proved as laid, at least if stated under a *videlicet*. But with respect to *title*, it is ordinarily of the substance of the issue; and, therefore, requires to be maintained accurately by the proof. Thus, in an action on the case, the plaintiff alleged in his declaration that he demised a house to the defendant for *seven years*, and that during the term, the defendant so negligently kept his fire that the house was burned down; and the defendant having pleaded that the plaintiff *did not demise in manner and form* as he had complained, it appeared in evidence that the plaintiff had demised to the defendant several tenements, of which the house in question was one;

but that with respect to this house, it was by an exception in the lease, demised *at will only*. The court held, that though the plaintiff might have declared against the defendant as tenant at will only, and the action would have lain, yet having stated a demise for seven years, the proof of a lease at will was a variance, and *that* in substance, not in form only; and on the ground of such variance, judgment was given for the defendant. (St. Pl. 326-'7.)

4<sup>d</sup>. The Exceptions to the General Rule requiring that Title should be Shown.

These exceptions embrace the case. (1), Where the opposite party is *estopped* to deny the title; and (2), Where, in *replevin*, a more general mode of alleging title is by statute allowed;

W. C.

1<sup>o</sup>. Where the opposite Party is *Estopped* to deny the Title alleged.

Where the opposite party is *estopped* from denying the title none need be alleged. Thus, in an action for goods sold and delivered it is unnecessary, in addition to the allegation that the plaintiff sold and delivered them to the defendant, to state that they were the goods *of the plaintiff*, for a buyer who has accepted and enjoyed the goods cannot dispute the title of the seller. So, in debt or covenant brought by the lessor against the lessee on the covenants of the lease, the plaintiff need allege no title to the premises demised, because a tenant is estopped from controverting his landlord's title. On the other hand, however, a tenant is not bound to admit title to any extent greater than might authorize the lease, and therefore, if the action be brought, not by the lessor himself, but by his heir, executor, or other representative or assignee, the title of the former must be alleged, in order to show that the reversion is now legally vested in the plaintiff in the character in which he sues. Thus, if he sue as heir, he must allege that the lessor was *seised in fee*, for the tenant is not bound to admit that he was seised in fee, and unless he was so seised, the plaintiff cannot claim as heir. (St. Pl. 327-'8.)

2<sup>o</sup>. Where in *Replevin* a more General Mode of Alleging Title is by Statute Allowed.

We have seen that, at common law, in making avowry or cognizance in *replevin*, the defendant was required to allege with particularity his title, or the title of his employer, to the lands where he distrained the goods in question. (*Ante*, p. 976.) This, however, was attended often with much inconvenience, which was remedied in cases of distresses *for rent*, by Stat. 11, Geo. II, c. 19, enacting that it should be lawful for all defendants in *replevin*

to avow or make cognizance *generally*, that the plaintiff in replevin or other tenant of the lands and tenements whereon such distress was made, enjoyed the same under a grant or demise at such a certain rent during the time wherein the rent distrained for accrued, which rent was then, and still remains due, without further setting forth the grant, demise, or title of such landlord or lessor. (3 Saund. 284 d, n (3).)

And whilst the action of replevin existed with us, similar embarrassments were experienced, (Southall v. Garner, 2 Leigh, 374, 376), and they were at length provided for by a statute conforming, in substance, to 11 Geo. II. c. 19. (Acts 1833-'4, p. 76, c. 64.) But replevin having been abolished at the revisal of 1849, this statute was, of course omitted, and, therefore, repealed. (V. C. 1873, c. 145, § 4; Id. c. 209, § 1.)

The tenant's impeachment of the lessor's distress is now, by statute with us, made through the medium of a *forthcoming bond*, by failing to deliver the property, and then resisting an award of execution thereon; and the opposition of a claimant of the property distrained, is made by the process of interpleader; and as neither of those proceedings requires any pleading at all, (V. C. 1873, c. 185, § 4; Id. c. 149, § 2, 3), there is with us at present little or no practical call for a statute like that of 11 Geo. II. c. 19.

#### 6°. RULE VI. THE PLEADINGS MUST SHOW AUTHORITY.

In general, when a party has occasion to justify under a writ, warrant, precept, judgment, or any authority whatever, he must set it forth particularly in his pleading. And he ought also to show that he has substantially pursued such authority. (St. Pl. 329; 3 Th. Co. Lit. 411, 412; Com. Dig. Pleader, (E. 17).)

Hence, in trespass, if the defendant justifies as bailiff, or assistant of the sheriff, it is not sufficient to say that he did it by the mandate of the sheriff, but he ought to show his warrant. (Mathews v. Cary, 3 Mod. 138-'9; Lamb v. Mills, 4 Mod. 378.)

Let us examine, (1), The general doctrine as to the mode of setting out authority; (2), The rules applicable to the pleading of judicial process as authority; and (3), The doctrine as to the proof of the authority alleged.

#### 1<sup>a</sup>. The General Doctrine as to the Mode of Setting out Authority.

The general doctrine as to the mode of setting out the authority under which a party justifies, is expressed by Lord Coke with his wonted pithiness, thus: "Regularly whensoever a man doth anything by force of warrant or authority, he must plead it." And in another connexion he adds, that "he ought to pursue the substance and effect of the

same accordingly." (3 Th. Co. Lit. 411, 412.) Thus, in an action of trespass for breaking and entering the plaintiff's close, breaking the gate and lock, and driving away the plaintiff's cows, the defendant pleaded the authority of an English statute which was said to allow such breaking under the circumstances; but the statute required the *presence of a constable* when the breaking took place, and the plea omitted to state that fact, and was, therefore, held to be insufficient. (*Rich v. Woolley*, 7 Bingh. (20 E. C. L.) 651.)

So in all cases where the defendant justifies under *judicial process*, he must set it forth particularly in his plea; and it is not always sufficient to allege, in general terms, that he committed the act in question by virtue of a certain writ or warrant directed to him. But the discussion of justification under judicial process had better be reserved to come under the second head of this inquiry, viz:

2<sup>d</sup>. The Rules applicable to the *Pleading of Judicial Process as Authority*.

The general principle is, as we have just seen, that where judicial process is pleaded as authority, by way of justification, it must be, for the most part, set forth particularly; but there are some important distinctions as to the degree of particularity which, in different cases, is required. Those distinctions will appear by observing, (1), That the party pleading need not set out the original cause of action; (2), The doctrine where the party pleading justifies *under a writ*; and (3), The mode of setting forth a judgment when it is required to be pleaded;

W. C.

1<sup>o</sup>. The Party Pleading Judicial Process *need not set out the original Cause of Action*.

It is not necessary that any person justifying under judicial process should set forth the *cause of action* in the original suit in which that process issued. We find this done at great length in *Pitt v. Knight*, 1 Saund. 90 a; but Mr. Sergeant Williams, in n (2) to that case, condemns such a mode of pleading as needlessly prolix, and observes that it is enough to state shortly that the one party at a time designated, impleaded the other in a certain named court, in a certain named action, and that *such proceedings were thereupon had*, (*taliter processum est*) that a certain judgment was pronounced, out of which the justification insisted upon is supposed to have arisen. (1 Saund. 91, n (2); *Doe v. Parmiter*, 2 Lev. 81; *Makareth v. Pollard*, 1 Ld. Raym. 80; *Higginson v. Martin*, 2 Mod. 195; *Rowland v. Veale*, Cowp. 19; *Belk v. Broadbent*, 3 T. R. 183.) And

such is the tenor of the modern forms. (3 Chit. Pl. 956, 956 a, 1091.)

2°. The Doctrine where the Party Pleading *Justifies under a Writ.*

The prominent distinction to be noted here is as to the doctrine, (1), Where the party pleading *is an officer*; and (2), Where he is *not an officer, nor an officer's assistant*; W. C.

1°. The Doctrine where the Party Pleading *is an Officer.*

Where the justification is by the officer executing the writ, he need plead the *writ only*, and not the *judgment* on which it was founded; for his duty obliges him to execute the writ without inquiring about the validity or existence of the judgment. And the same principle is believed to extend to the officer's assistant. But where the justification is *by a party* to the suit, or by *any stranger*, except an officer, the judgment as well as the writ must be set forth. (St. Pl. 331; Turner v. Felgate, 1 Lev. 95; Coates v. Michill, 3 Lev. 20; Britton v. Cole, 1 Salk. 409; Barker v. Braham, 3 Wils. 376; Parsons v. Lloyd, 3 Wils. 345.)

If the writ be such as it was the officer's duty to return, he must show that the writ *was returned* accordingly. But this would not in general apply to a writ of *execution* at common law, for by that law most writs of execution do not need to be returned; although to a writ of *capias ad respondendum* it would apply, since *mesne* process must always be returned. (St. Pl. 331-2; 3 Chit. Pl. 1087, & n (e): 1 Saund. 92, n (2); Britton v. Cole, 1 Salk. 409; Rowland v. Veale, Cowp. 20; Middleton v. Price, 2 Stra. 1184; Cheasley v. Barnes, 10 East. 73.) It should be observed, that in respect to this point of the necessity of the return of a returnable writ, a distinction is to be made between a principal and a subordinate officer. "The former," says Lord Holt, "shall not justify under the process, unless he has obeyed the court in returning it; *contra* of another who has not the power to procure a return to be made." (St. Pl. 332; Freeman v. Blewett, 1 Ld. Raym. 634; S. C. 1 Salk. 409; Moore v. Taylor, 5 Taunt. (1 E. C. L.) 69.)

2°. The Doctrine where the Party Pleading *is not an Officer, nor an Officer's Assistant.*

We have already seen that where the party pleading is neither an officer nor an officer's assistant he must show by way of justification, not the writ only, but the judgment also. (St. Pl. 331; *Supra*.)

3°. The Mode of Setting Forth a Judgment, when it is Required to be Plead.

A justification founded on the process of any of the superior courts of the commonwealth, that is, of any *court of record*, (and it is supposed the same principle would embrace the United States courts, which are in a sense domestic courts of every State, and of whose jurisdiction, powers, and organization the courts of every State must *ex-officio* take notice,) need not contain any allegation of the nature and extent of the jurisdiction of such court; nor that the cause arose, or that the subject-matter was within such jurisdiction. But where the process pleaded is that of an inferior domestic court, that is, a court *not of record*, or, as it seems, where it is the process of a court of foreign jurisdiction, the nature and extent of the jurisdiction ought to be set forth, and it ought to be shown that the cause of action arose, or at least that the subject-matter was within that jurisdiction. (St. Pl. 332; 4 Rob. Pr. 112; *Moravia v. Sloper*, Willes. 30, 34 & seq; *Collett v. Lord Keith*, 2 East. 260.)

The judgment of a domestic superior court is pleaded, as we have seen, without setting forth any of the previous proceedings in the suit, averring that the party pleading did, in a named court, and on a named day, "*by the consideration and judgment of the said court*," recover against the other party, &c. (9 Wentw. Pl. 22, 53, 120, 351.) But in pleading a judgment of an inferior court, and it is believed of a foreign court, the previous proceedings are stated, but with brevity; it being allowable to set them forth with a *taliter processum est*, thus, that "C. C., at a certain court, &c., held at, &c., levied his plaint against D. D., in a certain plea of trespass on the case [or *debt*, &c., as the case may be], for a cause of action arising within the jurisdiction thereof, and *thereupon such proceedings were had*, that afterwards, &c., it was considered by the said court that the said C. C. should recover against the said D. D.," &c. (St. Pl. 333; 4 Rob. Pr. 112; 1 Saund. 92, n (2); *Rowland v. Veale*, Cowp. 18; *Barnes v. Harris*, 4 Comst. (N. Y.) 374.)

Notwithstanding the general rule under consideration, it is allowable, in those cases where an authority may be constituted verbally and generally, to plead it in general terms. Thus where trespass *quare clausum fregit* is brought against one who justifies as agent of a principal who is alleged to be the true owner of the *locus in quo*, he may plead his entry by authority of such alleged owner, without showing any warrant for that purpose. (St. Pl. 333; *Matthews v. Cary*, 3 Mod. 138.)

3<sup>d</sup>. The Doctrine as to the *Proof of the Authority alleged*.

The averment of *authority*, like that of *title*, must in general be strictly proved as laid. (St. Pl. 333.)

The particulars above mentioned, of *place, time, quality, quantity, and value, names of persons, title, and authority*, although, in pursuance of Mr. Stephen's arrangement, made the subject of distinct rules, with a view to convenient classification and exposition, are to be considered but as examples of that infinite variety of circumstances which it may become necessary, in different cases and forms of action to particularize, for the sake of producing an issue that is certain; for it may be laid down as a comprehensive rule, which we shall next discuss, that *in general, whatever is alleged in pleading must be alleged with certainty*. (St. Pl. 334; Com. Dig. Pleader, (C. 17), (C. 22), (E. 5), (F. 17).)

7<sup>c</sup>. RULE VII. IN GENERAL, WHATEVER IS ALLEGED IN PLEADING MUST BE ALLEGED WITH CERTAINTY.

This rule being very wide in its terms, it must be illustrated by sundry examples, and the whole subject may be presented under the heads following, namely: (1), The mode of alleging performance of conditions; (2), The mode of setting forth pleas generally, with due certainty; and (3), The correspondence of the proof with the averment;

W. C.

1<sup>a</sup>. The Mode of alleging *Performance of Conditions and Covenants*.

In pleading the performance of a condition, or of a covenant, the general principle already announced must, for the most part, be observed, namely, to set forth the performance *with certainty*, that is, with all the particulars of place, time, and manner. But as such a mode of pleading would sometimes lead to an unreasonable degree of prolixity, some necessary exceptions to this general doctrine must be admitted. The discussion of this head therefore, may be resolved into the notice of (1), The general rule touching the mode of alleging performance of conditions or of covenants; and (2), The exceptions to the general rule;

W. C.

1<sup>o</sup>. The general Rule touching the Mode of alleging Performance of Conditions, or of Covenants.

The general rule as to the mode of averring performance of conditions and of covenants is, as already stated, that the party must not plead generally that he performed the covenant or condition, but must show specially, the time, place, and manner of performance; and even though the subject to be performed should consist of several different acts, yet he must show in this special way, the performance of each. (St. Pl. 334; Com. Dig. Pleader, (E. 25), (E. 26), (2 W. 23); (C. 58) to (C. 61); 1 Chit. Pl. 356-7, 567 &

seq; 1 Saund. 116, n (1); *Wimbleton v. Holdrip*, 1 Lev. 303.)

Thus, in debt upon a bond, conditioned for the payment of £30 to H. S., J. S. and A. S., *as soon* as they should come to the age of twenty-one years, the defendant pleaded that he paid those sums *as soon* as they came of age, and the plaintiff demurred, because it was not shown *when they came of age* and the *certain time of the payments*. "And all the court held *the plea to be ill*; for although it be a good plea regularly to the condition of a bond to pursue the words of the condition, and to show the performance, yet Coke (C. J.) said there was another rule, that he ought to plead in certainty the time and place, and manner of the performance of the condition, so as a certain issue may be taken, otherwise it is not good; wherefore, because he did not plead here in certainty, it was adjudged *for the plaintiff*. And between the same parties, in another action of debt upon an obligation, the condition being for the performance of legacies in such a will, he pleading performance generally, and not showing the will, nor what the legacies were, "it was adjudged for the plaintiff." (*Halsey v. Carpenter*, 3 Cro (Jac.), 359).

And so, in debt on a bond conditioned to do divers particular things in the condition mentioned, the defendant pleaded *performavit omnia*—that he had performed all things in the condition contained. And upon demurrer it was adjudged an ill plea, for the particulars being expressed in the condition, he ought to plead to each particularly by itself." (*Wimbleton v. Holdrip*, 1 Lev. 303).

We are now to mention certain exceptions to this general rule.

2°. Certain Exceptions to the general Rule requiring the Performance of Conditions, &c., to be *alleged with Particularity*.

The general rule requiring performance to be specially shown admits of relaxation in three classes of cases, namely: (1), Where the subject comprehends a great multiplicity of particulars; (2), Where upon a condition to indemnify the plaintiff, the plea is *non damnificatus*; and (3), Where the condition is for the performance of matters set forth in *another instrument*, which matters are neither in the *negative* nor in the *disjunctive*. These variations from the ordinary rule will be fully explained hereafter (*post p.* ), together with the principles on which they are founded. At present they will be separately mentioned, in order to impress them upon the student's memory:

W. C.

1°. Where the Subject Comprehends a *Great Multiplicity of Particulars*.



Where the subject comprehends a great multiplicity of particulars, in order to *avoid undue prolixity*, a general mode of alleging performance of conditions or covenants is allowed, as a bond to return *all writs, &c.*, or that a collector of taxes should *give an account of all taxes received*, or that a sheriff should duly perform all his multifarious duties. (St. Pl. 336; 1 Saund. 117, n (1); 3 Saund. 411, n (4); Com. Dig. Pleader, (2 V. 13), (E. 26); Bac. Abr. Pleas, &c. (I) 3; 1 Chit. Pl. 567; Mints v. Bethil, 2 Cro. (Eliz.) 749; J'Anson v. Stuart, 1 T. R. 753-4; Barton v. Webb, 8 T. R. 459, 464.)

2<sup>d</sup>. Where, upon a Condition to *Indemnify*, the Plea is *Non Damnificatus*.

The plea of *non damnificatus* to an action of debt on an indemnity bond, that is, a bond conditioned "to keep the plaintiff harmless and indemnified," &c., is in the nature of a plea of performance, and depends on the same principle as the preceding, a general mode of pleading being allowed in order to avoid excessive, and, upon the whole, needless prolixity, seeing that the plaintiff may without difficulty maintain the certainty of the issue, by setting forth in his replication, as the rules of pleading require him to do, the particulars wherein he has suffered loss by the defendant's default. But in order to make this mode of pleading proper, the condition must use the words "*indemnify*," or "*save harmless*," or some equivalent term, and not stipulate for the performance of some specific act by way of indemnity; and the plea must be in the negative, *non indemnificatus*, and not in the affirmative, "that he has saved harmless." Unless both these things concur, the plea must set forth the performance specifically, according to the general rule. (St. Pl. 360-'61; Bac. Abr. Pleas, &c. (I), 3; 3 Th. Co. Lit. 413; 1 Saund. 117, n (1); Codner v. Dalby, 3 Cro. (Jac.) 363; Horseman v. Obbins, 3 Cro. (Jac.) 634; Manser's Case, 2 Co. 4 a, & n's (Q) & (P).)

3<sup>d</sup>. Where the Condition is for the Performance of Matters set forth in *Another Instrument*, which Matters are neither in the *Negative* nor in the *Disjunctive*.

In this case also, and for the same reason, namely, to avoid prolixity, a *general plea of performance* is allowed. (St. Pl. 336, 363; 3 Th. Co. Lit. 413; Com. Dig. Pleader, (2 V. 13); Bac. Abr. Pleas, &c. (I) 3; 1 Saund. 117, n (1); Lord Arlington v. Merricke, 2 Saund. 411; Wimbleton v. Holdrip, 1 Lev. 303.) The student will observe, that if the matters contained in the other indenture or instrument are in the *negative*, a general plea of performance would be *argumentative*; and if they were in the

*disjunctive*, the plea would be *equivocal*, both of which are much deprecated faults in pleading. (St. Pl. 366; 3 Th. Co. Lit. 413; 1 Saund. 117, n (1).)

When, in any of these three excepted cases, the general plea of *performance* of conditions or covenants is pleaded, the plaintiff must impart to the issue the requisite *particularity* or *certainty*, by setting forth *specially* in his *replication* how and in what particulars the condition or covenant *has been broken*. (St. Pl. 336-7; Com. Dig. Pleader, (F. 14); 1 Chit. Pl. 568; 3 Th. Co. Lit. 413; 1 Saund. 117, n (1); Mints v. Bethil, 2 Cro. (Eliz.) 749; Cox v. Joseph, 5 T. R. 310.) Of this principle and its application we have an illustration in *Green v. Bailey*, 5 Munf. 248, which was an action of debt on a bond conditioned to perform an award. The defendant pleaded generally, "conditions performed" (the case being probably considered to be within the first exception, (*Supra*, p. 988, 1<sup>st</sup>),) to which the plaintiff "replied generally," that is, by a simple traverse of the plea, and issue was joined thereon. The verdict was for the plaintiff, and the defendant then moved *in arrest of judgment*, upon the ground that the replication should have set out the award, and *showed how it had been broken*, and that in consequence of its not having done so, the issue was too much wanting in *certainty* to be tried, or for judgment to be pronounced upon the verdict. Of this opinion was the court, and accordingly no judgment was given on the verdict, the proceedings subsequent to the plea (including the objectionable replication, the issue thereupon, and the verdict), were set aside, and a *repleader* was awarded. See *Meredith v. Alleyn*, 1 Salk. 138; *Brickhead v. Archbishop of York*, Hob. 198; *Heard v. Baskerville*, Hob. 233; 1 Saund. 103 c, 103 d; n (4) and (6); *Plomer v. Ross*, 5 Taunt. (1 E. C. L.) 386.)

The distinction between those cases where it is *necessary* to assign a breach in the replication, and where not, seems to be taken by Holt, Chief Justice, in the case just cited of *Meredith v. Alleyn*, 1 Salk, 138. That "in all cases (that of a bond to perform an award excepted), if a defendant pleads a special matter that admits and excuses a non-performance, the plaintiff need only answer and falsify the special matter alleged; for he that excuses a non-performance supposes it, and the plaintiff need not show that which the defendant has supposed and admitted; but if the defendant pleads a performance of the condition, though it be not well pleaded, the plaintiff, in his replication, must show a breach, for then he has not a cause of action unless he show one." The reason of the

excepted case, that of the *award*, is by the same judge explained in the same case to be, that "though an award be made, yet it may be void in whole or in part, and, therefore, the plaintiff must not only show the award (when it is denied), that the court may see that there was an award, but must also set forth the breach, that it may appear likewise that the non-performance was of a *good part* of the award, and not of a *void part* thereof, for in that it need not be performed."

2<sup>d</sup>. The Mode of setting forth *Pleas generally with due Certainty*.

The books present a variety of cases which afford, in respect of pleas, an illustration of the general rule that, "whatever is alleged in pleading must be alleged with certainty."

Thus, where to a declaration on a promise to pay the debt of a third person, the defendant pleads that there was no agreement, or memorandum, or note thereof in writing, signed by the defendant, or any person by him lawfully authorized, as required by the statute of frauds; that is, with us, *of parol agreements*, (V. C. 1873, c. 140, § 1, (cl. 4).) and the plaintiff replies that there was such an agreement, concluding to the country, it seems that this replication is insufficient, and that it ought to *set the agreement forth*. (Saunders v. Waketield, 4 B. & Ald. (6 E. C. L.) 595; Lowe v. Eldred. 1 Cr. & Mecs. 239.) But see an earnest dissent from this doctrine in Lilly v. Hewitt, 11 Price, 494, which, however, was prior to Lowe v. Eldred.

So in debt on a bond, the defendant pleaded that the instrument was executed in pursuance of a certain corrupt contract, made at a time and place specified, between the plaintiff and defendant, whereupon there was reserved above the rate of £5 for the forbearing of £100 for a year, contrary to the statute in such case made and provided. To this plea there was a demurrer, assigning for cause that the particulars of the contract were not specified, nor the time of forbearance, nor the sum to be forborne, nor the sum to be paid for such forbearance. And it was held that the plea was bad for not setting forth particularly the corrupt contract and the usurious interest. (St. Pl. 338; 3 Chit. Pl. 966; Hill v. Montague, 2 M. & S. 378; Hinton v. Roffey, 3 Mod. 35.) This special application of the rule, that is, to a plea of usury, has, in Virginia, been judiciously modified by statute, which provides that "any defendant may plead in general terms that the contract or assurance on which the action is brought was for the payment of interest at a greater rate than is allowed by law, to which plea the plaintiff shall reply generally, but may give in evidence upon the issue

made up thereon any matter which could be given in evidence under a special replication; under the plea aforesaid the defendant may give in evidence any fact showing, or tending to show, that the contract or assurance, or other writing upon which the action was brought, was for an usurious consideration." (V. C. 1873, c. 137, § 8.) And although this enactment is in terms applicable to pleas alone, yet it may also be properly applied to a defence of usury against a set-off. (*Hope v. Smith*, 10 Grat. 221.)

Again, to an action on the case for a libel which imported that the plaintiff was connected with swindlers and common informers, and had also been guilty of deceiving and defrauding divers persons, the defendant pleaded that the plaintiff had been illegally, fraudulently, and dishonestly concerned with, and was one of a gang of swindlers and common informers, and had also been guilty of deceiving and defrauding divers persons with whom he had had dealings and transactions. To this plea there was a special demurrer, assigning for cause *inter alia*, that the plea did not state the *particular instances of fraud*; and the plea was adjudged insufficient for that reason. (St. Pl. 339; *J'Anson v. Stuart*, 1 T. R. 738).

So, in an action of trespass for *false imprisonment*, the defendants pleaded, that before the said time when, &c., certain persons unknown had forged a receipt on a certain forged dividend-warrant, and received the money purporting to be due thereon in Bank of England notes, amongst which was a note for £100, which was afterwards exchanged at the Bank for other notes, amongst which was one for £10, the date and number of which was afterwards altered; that afterwards, and a little before the said time when, &c., the plaintiff was *suspiciously* possessed of the altered note, and did in a *suspicious* manner dispose of the same to one A. B., and afterwards in a *suspicious* manner left England and went to Scotland; whereupon the defendants had *reasonable cause to suspect*, and did suspect, that the plaintiff had forged the said receipt; and so proceeded to justify the taking and detaining his person, to be dealt with according to law. Upon general demurrer this plea was considered as clearly bad, because it did not show the *grounds* of suspicion with certainty enough to enable the court to judge of their sufficiency; and it was held that the use of the word *suspiciously* would not compensate that omission. (*Mure v. Kaye*, 4 Taunt. 41 & seq.)

In an action of trover to recover the value of a ship taken by the defendant, the latter pleaded that he was captain of a certain man-of-war, and that he seized the ship mentioned in the declaration as prize; that he carried her to a certain

port in the East Indies, and that the admiralty court there gave sentence against the said ship as a lawful prize. Upon demurrer, it was adjudged to be necessary for the plea to show some *special cause* for which the ship became a prize; and that the defendant ought to show who was the judge that gave sentence, and to whom that court of admiralty did belong; and for the omission of these matters the plea was adjudged insufficient. (St. Pl. 340-41; *Beak v Tyrell*, Carth. 31).

With respect to all points on which certainty of allegation is required, it may be remarked in general that the allegation, when brought into issue, requires *to be proved in substance as laid*; and that the relaxation of the ordinary rule upon this subject, which is allowed with respect to *time*, *quantity*, and *value*, when alleged under a *videlicet*, does not, generally speaking, extend to other particulars. (St. Pl. 342).

8°. RULES OF A SUBORDINATE KIND IN LIMITATION AND RESTRICTION OF THE PRINCIPAL RULES TOUCHING CERTAINTY.

The principal rules tending to *certainty of allegation* having been stated, it is to be observed that these rules receive considerable *limitation* and *restriction* from some other rules of a subordinate kind, to the examination of which it will now be proper to proceed. They resolve themselves into the following: (1), It is not necessary in pleading to state that *which is merely matter of evidence*; (2), It is not necessary to state matter of which the court *ex-officio* takes notice. (3), It is not needful to allege circumstances which would *come more properly from the other side*; (4), It is not needful to state circumstances *necessarily implied*; (5), It is not necessary to *allege what the law will presume*; (6), A general mode of pleading is allowed *where great proximity is thereby avoided*; (7), A general mode of pleading is sometimes sufficient where the *allegation on the other side must reduce the matter to a certainty*; (8), No greater particularity is required than the *nature of the thing pleaded will conveniently admit*; (9), Less particularity is required where the *facts lie more within the knowledge of the adversary* than of the party pleading; (10), Less particularity is necessary in the statement of matter of *inducement* or *aggravation* than in the main allegations; and (11), Acts valid at common law, but *regulated as to the mode of performance by statute*, may be stated as at common law.

W. C.

1<sup>d</sup>. It is not necessary in Pleading to state that *which is merely Matter of Evidence*.

"Evidence," says Lord Coke, "shall never be *pleaded*, because it tends to prove matter in fact, and, therefore, the

matter in fact shall be pleaded." (Dowman's Case, 9 Co. 9 b.) It is not proper in alleging a fact, to state such circumstances as merely tend to prove it. It is necessary to aver the fact directly. (St. Pl. 342.)

This rule may be illustrated by the following cases :

In an action of replevin for seventy cocks of wheat, the defendant avowed under a distress *for rent arrear*. The plaintiff pleaded in bar, that before the said time when, &c., one H. L. had recovered judgment against G. S., and sued out execution, that G. S. was tenant at will to the defendant, and had sown seven acres of the premises with wheat, and died possessed thereof as tenant at will; that after his death the sheriff took the said wheat in execution, and sold it to the plaintiff, that the plaintiff suffered the wheat to grow on the *locus in quo* till it was ripe and fit to be cut; that he afterwards cut it and made it into cocks, whereof the said seventy cocks were parcel; that the said cocks being so cut, the plaintiff suffered the same to lie on the said seven acres until the same, in the course of husbandry, *were fit to be carried away*; and that, while they were so lying, the defendant, of his own wrong, took and distrained the same under pretence of a distress, the said wheat not being then fit to be carried away, according to the course of husbandry, &c. The defendant demurred, and among other objections, urged that it ought to have been particularly shown how long the wheat remained on the land after the cutting, that the court might judge whether it were a *reasonable time* or not. But the court decided against the objection. "For though," said Lord Chief Justice Willes, "it is said in Co. Lit. 56 b, (1 Th. Co. Lit. 644), that in some cases the court must judge whether a thing be reasonable or not, as in case of a reasonable fine, a reasonable notice, or the like, it is absurd to say that in the present case the court must judge of the reasonableness; for if so, it ought to have been set forth in the plea, not only how long the corn lay on the ground, but likewise what sort of weather there was during that time, and many other incidents which would be ridiculous to be inserted in a plea. We are of opinion, therefore, that this matter is sufficiently averred, and that the defendant might have traversed it if he had pleased, and then it would have come before a jury, who, upon hearing the evidence, would have been the proper judges of it." (Eaton v. Southby, Willes, 134.)

The reason of this rule is evident, if we revert to the general object which all the rules tending to certainty contemplate, viz: the attainment of a certain issue. This implies, as we have seen, a development of the question in controversy in a specific shape; and the degree of specification

has been elsewhere defined (*Ante*, p. 571 & seq.). But so that that object be attained, there is, in general, no necessity for further minuteness in the pleading; and therefore those subordinate facts which go to make up the evidence by which the affirmative or negative of the issue is to be established, do not require to be alleged, and may be brought forward, for the first time, at the trial when the issue comes to be decided. Thus, in the above example, if we suppose the issue joined, whether the wheat cut was afterwards suffered to lie on the ground *a reasonable time or not*, there would have been sufficient certainty, without showing in the pleadings any of those circumstances (such as the number of days, the state of the weather, &c.,) which ought to enter into the consideration of that question. These circumstances, being matter of evidence only, ought to be proved before the jury, but not encumber the record. (St. Pl. 345.)

This is a rule, says Mr. Stephen, so elementary in its kind, and so well observed in practice, as not to have become frequently the subject of illustration by decided cases, and has therefore been little noticed in the digests and treatises. It is, however, a rule of great importance, from the influence it exerts on common law pleading; and it is this more than any other principle of the science which tends to prevent that minuteness and prolixity of detail, in which the allegations, under other systems or judicature, are involved.

2<sup>d</sup>. It is not Necessary to State Matter of which *the Court takes Notice ex-officio*.

This is another rule that conduces much to the same effect as the preceding. It follows from it that it is unnecessary to state *matter of law*; for this the judges are bound to know, and can apply for themselves to the facts alleged; and in some instances, for the same reason, it is unnecessary to state certain exceptional *matters of fact*;

W. C.

1<sup>o</sup>. Matter of *Law*.

It is, in general, unnecessary to state matter of law, that is, of the law of our own country; but it will be remembered, that there are two divisions of the law, namely, (1), Common law; and (2), Statute law, which it is expedient to examine separately. As to *foreign* law (and the laws of the sister States are foreign to us), no court takes judicial notice of them; but they must be proved as *facts*, and must therefore be set out in pleading. (*Ante*, p. 724; 1 Greenl. Ev. § 486 & seq.)

1<sup>f</sup>. Doctrine as to Averring *Matter of Common Law*.

Without exception, all matters of common law, includ-

ing the civil, ecclesiastical, and marine laws, are unnecessary to be stated. The court's function is in all cases to determine the common law applicable to any given state of facts. Thus, if it be stated that an officer of a corporate body was removed for misconduct by the corporate body at large, it is not necessary to aver that the power of removal was vested in such corporate body; because that is a power incidental to corporations, unless denied by the charter, or by some adequate authority, and conferred upon some other person or persons. (St. Pl. 346; 1 Insts. Com. & Stat. Law, 527; *King v. Lyme Regis*, 1 Dougl. 158.) And so in an action upon a by-law made by a corporate body, it is not necessary to state the power of the body to make by-laws, because it is by law incident to every corporation to make such laws, unless the power is bestowed upon a select part. (1 Insts. Com. & Stat. Law, 553; *Feltmakers' Co. v. Davis*, 1 Bos. & P. 98.)

2<sup>d</sup>. Doctrine as to averring *Matter of Statute Law*.

It is not the principles of the common law alone which it is unnecessary to state in pleading. The *public statute law* falls within the same reason and the same rule, as the judges are bound officially to notice the tenor of every *public act* of the legislature. It is therefore never necessary to set forth a *public statute*. (St. Pl. 347; 1 Insts. Com. & Stat. Law, 38; Pot. Dwar. Stats. 52 & seq.)

But in respect to *private statutes*, it is different. These the court does not officially notice, and at common law they must be both set forth in the pleading, and afterwards proved as set forth. (St. Pl. 347; 1 Insts. Com. & Stat. Law, 38; Pot. Dwar. Stat. 53, and n (1).) In Virginia, however, it is by statute provided, that "Acts and resolutions of the general assembly, though local or private, may be given in evidence *without being specially pleaded*; and an appellate court shall take judicial notice of such as appear to have been relied on in the court below." (V. C. 1873, c. 172, § 1; *Legrand v. H. Sid. Col.* 5 Munf. 324; *Somerville v. Wimbish*, 7 Grat. 225.) Whether a statute is public or private depends on its character. If it concerns the great body of the community it is public; otherwise it is private. Perhaps the best discrimination between the two classes of acts is to be found in Bac. Abr. Stat. (F). Although the words of a statute are particular, yet if the intent be general, it is a public statute, and *vice versa*. (*Beawfage's Case*, 10 Co. 101 b; *Holland's Case*, 4 Co. 76 a, & seq., where profuse illustrations are stated.) In Virginia, the laws creating the former banks of the Commonwealth were held to be public statutes, because the State had a large interest in



and control over them, and also because it was *made felony to counterfeit their notes*. (Stribbling v. Bank of the Valley, 5 Rand. 139-'40.) And in Young v. The Bank of Alexandria, 4 Cr. 388, the Supreme Court of the United States intimated a strong opinion that the latter circumstance, that is, the making the counterfeiting of the notes of the bank a felony, constituted the charter always a public act; a view which seems to have been generally adopted, and extended so as to embrace all corporations in respect to which provisions are made for the forfeiture of penalties to the State, or for the punishment of felonies in relation thereto. (Bac. Abr. Stat. (F); Pot. Dwar. Stat. 53 and notes; Jenkins v. Union T. Pike, 1 Cai. Cas. (N. Y.) 85; Bank of Utica v. Smedes, 3 Cow. (N. Y.) 662.) It is furthermore to be observed on this subject, that a private act which provides that it shall be deemed a public act, is thereby made public, at least so far as relates to the necessity for pleading it. (Bac. Abr. Stat. (F); Beaty v. Lessee of Knowler, 4 Pet. 167; Hesse v. Stevenson, 3 Bos. & P. 578.)

It may be observed that, though it is in general unnecessary to allege matter of law, yet there is sometimes occasion to make mention of it, for the convenience or intelligibility of the statement of fact. Thus, in an action of assumpsit it is very common to state that the defendant, under the particular circumstances set forth in the declaration, *became liable* to pay; and being so liable, in consideration thereof promised to pay. So, it is sometimes necessary to refer to a public statute in general terms, to show that the case is intended to be brought within the statute; as for example, to allege that the defendant committed a certain act *against the form of the statute in such case made and provided*; but the reference is made in this general way only, and there is no need to set the statute forth. (St. Pl. 347-'8).

This rule, by which matter of law is omitted in the pleadings, by no means prevents the attainment of the requisite certainty of issue. For even though the dispute between the parties should turn upon matter of law, yet they may evidently obtain a sufficiently specific issue of that description, without any *allegation* of law; for *ex facto jus oritur*, that is, every question of law necessarily arises out of some given state of facts; and therefore, nothing more is necessary than for each party to state alternately his case *in point of fact*; and upon demurrer to the sufficiency of these pleadings, the issue in law must at length arise, if there is any room for such an issue. (St. Pl. 348).

As it is unnecessary to *allege* matter of law, so if it be alleged, it is improper, as we have elsewhere seen, (*Ante*, p. 906), to make it the subject of traverse.

2°. *Matter of Fact.*

Besides points of law, there are many matters of fact of a public kind of which the courts take official notice, and which, therefore, need not be averred in pleadings. The judge, if his memory is at fault, must resort to such documents and sources of information as are accessible to him, and as he may deem worthy of confidence, in order to determine them. The matters thus *ex officio* noticed, and which for that reason are not required to be alleged in pleading, may be thus classified and enumerated. (1 Greenl. Ev. § 4 & seq; 1 Chit. Pl. 245 & seq, 249 & seq; 1 Whart. Ev. § 276 & seq; 287 & seq; 317 & seq.)

W. C.

1°. Public Functionaries, Public Seals, and Acts of State.

This class will include,—

The existence and titles of sovereign powers throughout the civilized world;

The usual symbols of Nationality and Sovereignty; namely, the Flag and Seal;

Where nations are divided, the newly formed State is not officially recognized by the judicial tribunals, until acknowledged by the political department of the government, which with us is, for this purpose, the federal Executive. Until so recognized, the existence, and the flag and seal of the new State must be proved as facts, and consequently must be alleged in pleading.

Public acts, decrees and judgments of foreign States, *exemplified*, under their public seals. (1 Greenl. Ev. § 4.)

2°. The Law of Nations, Seals of Notaries, and of Admiralty courts, and in general, all facts commonly known and notorious.

Here will be included,—

The Law of Nations;

The seal of a notary public, he being an officer recognized by the whole commercial world.

The seals of foreign admiralty and maritime courts, which are regarded as courts of the civilized world;

The general customs and usages of merchants, and of trade;

The usual course of trade, as for example, between the West and New York;

Things which must have happened in the ordinary course of nature; as the period of gestation, physiological impossibilities of procreation, &c.;

Course of the almanac,—and of the heavenly bodies,—  
and the ordinary measurement of time;

Difference of time in different longitudes;

Ordinary public fasts and festivals;

Coincidence of days of the week, with days of the month;

Meaning of words in the vernacular tongue; but not the meaning of special phrases;

Customary abbreviations;

Meaning of familiar literary allusions;

Legal weights and measures, and legal coin and currency; but not the extent of its depreciation;

Usual practice and course of conveyancing;

Matters of public history affecting the whole people;

Public matters affecting the government of the country, as in its relations with foreign powers, &c.

Whatever ought to be generally known within the limits of their jurisdiction, such as any process of art or science which has become a matter of *common knowledge*, as that by photography likenesses are taken, that certain processes produce certain results, &c. (1 Greenl. Ev. § 5; 1 Whart. Ev. § 282 &c.; Id. § 327 & seq.)

### 3<sup>d</sup>. Political Divisions, Events, and Public Officers of the Country.

Under this head may be included, as what courts will officially notice,—

The territorial extent of jurisdiction and sovereignty exercised by their government;

The local divisions of their country, as into States, provinces, counties, cities, towns, parishes, and the like, so far as political government is concerned or affected;

The relative positions of such local divisions; but not the precise boundaries, further than as described in public statutes;

The distance of county-seats from the seat of government. (Mendum's Case, 6 Rand. 704);

The political constitution or frame of their own government;

The essential political agents and public officers conducting its regular administration;

The essential and regular political operations, powers, and action of the government;

*e. g.* Accession of the chief executive;

His powers and privileges;

His signature.

Heads of departments, principal officers of state, and the public seals;

Election or resignation of a senator of the United States;

Appointment of a cabinet or foreign minister;

Marshals and sheriffs, and the genuineness of their signatures; but not their deputies, except as deputies may be recognized by statute, as in Virginia they are;

County officers generally;

Courts of general jurisdiction, their judges, seals, rules, and maxims, and course of proceeding;

Justices of inferior courts, with their jurisdiction, &c., as justices of the peace, &c.;

Public proclamations of war and peace;

Days of *special* public fast and thanksgiving;

Stated days of general political elections;

Sittings of the legislature, and its established course of proceeding, and the privileges of its members, but not the transactions stated in its journals;

Ports and waters of the United States, in which *the tide ebbs and flows*, and probably *all navigable waters*;—in the United States courts;

Boundaries of the several States, and of the several judicial districts of the United States;—in the United States courts;

Laws and jurisprudence of the several States and Territories;—in the United States courts;

Jurisdiction of the inferior courts whose judgments are revised.

(1 Greenl. Ev. § 6; 1 Whart. Ev. § 287 & seq; Id. § 317 & seq.)

3<sup>d</sup>. It is not Needful to Allege *Circumstances which would come more properly from the Other Side.*

The meaning of this rule is, that it is not necessary to anticipate the answer of the adversary, which, according to Lord Hale, is "like leaping before one comes to the stile." (St. Pl. 350; Com. Dig. Pleader, (C. 81); Bovy's Case, 1 Vent. 217.) It is sufficient that each pleading should in itself contain a good *prima facie* case, without reference to possible objections, which may exist but have not yet been presented. It will be expedient to state, (1), One or more illustrations of the rule or principle in question; and (2), The exceptions to the principle;

W. C.

1<sup>o</sup>. Illustrations of the Principle or Rule.

In debt on a bond it is unnecessary to say in the declaration that the defendant was of *full age* when he executed the bond. (Stowel v. Lord Zouch, 1 Plowd. 376; Walsingham's Case, 2 Plowd. 564 a.) So if one pleads that such an one being seised, made his will devising certain

land, it is not necessary to say that he was of *full age*, of *sound mind*, &c. (Com. Dig. Pleader, (C. 81); Stowel v. Lord Zouch, 1 Plowd. 376.) See also, for further illustrations, St. John v. St. John, Hob. 78; Hotham v. E. Ind. Co. 1 T. R. 638.)

2°. Exceptions to the Principle or Rule.

There are several exceptions to the rule or principle that it is not necessary to state matter which would come more properly from the other side, which may be classed under two heads, namely, (1), Where the matter is essential to the *prima facie* right of the party pleading; and (2), Where the pleading is of a character *not regarded favorably* by the courts;

1°. Where the Matter is Essential to the *prima facie* Right of the Party Pleading.

Where the matter is such that its affirmation or denial is essential to the apparent or *prima facie* right of the party pleading, there it ought to be affirmed or denied by him in the first instance, though it may be such as would otherwise properly form the subject of objection on the other side. Thus, in an action of trespass on the case, brought by a commoner against a stranger for putting his cattle on the common, whereby he was prevented from *enjoying the common in as ample a manner as he was entitled to do*, the defendant pleaded a license from the lord to put his cattle there, but did not aver that there was *sufficient common left* for the commoners. This, on demurrer, was held to be not a good plea; for though it may be objected that the plaintiff may reply that there was not enough common left, yet as he had already alleged in his declaration that his enjoyment of the common was *obstructed*, the contrary of this ought to have been shown by the plea. (St. Pl. 352; Smith v. Fевe-rell, 2 Mod. 6.)

2°. Where the Pleading is of a Character *not regarded favorably* by the Courts.

The rule in question does not apply in the case of certain pleas which are regarded unfavorably by the courts as having the effect of excluding the truth. Such are all pleadings in *estoppel*, and the plea in suspension of the action, of *alien enemy*; and in these cases there must be *certainty to a certain intent in every particular*. (3 Th. Co. Lit. 361, 431; Com. Dig. Pleader, (c. 17); Doonston v. Payne, 2 H. Bl. 530; Oystead v. Shed, 12 Mass. 509.) Thus, in a plea of *alien enemy*, in suspension of the action, the defendant must state, not only that the plaintiff was born in, or was a citizen of, a foreign country now at enmity with the United States, but that he came hither with-

out letters of safe conduct. (*Casseres v. Bell*, 8 T. R. 166.) Whereas, according to the *general rule* now under discussion, and which, in other cases less jealously regarded, would apply, such safe conduct, if granted, should be averred by the plaintiff in reply, and would not need, in the first instance, to be denied by the defendant. (St. Pl. 353.)

4<sup>d</sup>. It is not needful to *allege Circumstances necessarily Implied.*

Thus, in an action of debt on a bond conditioned to stand to and perform the award of W. R., the defendant pleaded that W. R. *made no award*. The plaintiff replied that, after the making of the bond, and before the time for making the award, the defendant, by his certain writing, *revoked the authority* of the said W. R., contrary to the form and effect of the said condition. Upon demurrer it was held that this replication was good, without averring that W. R. had notice of the revocation, because that was implied in the words, "*revoked the authority*;" for there could be no revocation without notice to the arbitrator; so that, if W. R. had no notice, it would have been competent to the defendant to traverse the revocation by averring that "he *did not revoke* the authority of W. R. in manner and form as alleged," and tender an issue thereon. (St. Pl. 353-'4; Bac. Abr. Pleas, &c. (I). 7; Com. Dig. Pleader, (E. 9); 3 Saund. 305 a, n (13); *Vynior's Case*, 8 Co. 82 a; *Marsh v. Bulteel*, 5 B. & Ald. (7 E. C. L.), 507.) So, if a feoffment be pleaded, it is not necessary to allege livery of seisin, for it is implied in the word "*enfeoffed*." (Com. Dig. Pleader, (E. 9); 3 Th. Co. Lit. 408.) And so, if a man plead that he is *heir to A.*, he need not allege that A. is dead, for that is implied in the party being *his heir*. (3 Saund. 305 a, n (13); Com. Dig. Pleader, (E. 9).)

5<sup>d</sup>. It is not necessary to *allege what the Law will Presume.*

Thus, in an action for words, as for saying a man is a *thief*, the plaintiff has no occasion to aver that he is not a thief, because the law presumes his innocence until the contrary be shown. (1 Chit. Pl. 253; *Chapman v. Pickersgill*, 2 Wils. 147.) So in an action on the case for maliciously filing a petition in bankruptcy to make the plaintiff an involuntary bankrupt, it is not necessary to state in the declaration that the plaintiff was not indebted to the defendant, or that he never committed an act of bankruptcy. (1 Chit. Pl. 253; *Chapman v. Pickersgill*, 2 Wils. 147.)

6<sup>d</sup>. A general Mode of Pleading is allowed *where great Probability is thereby Avoided.*

The extent and application of this rule may be collected with some degree of precision from the examples which

illustrate it, and by considering the limitations which it necessarily receives from the rules tending to certainty, as previously enumerated in the present section. (St. Pl. 335-'6; 3 Th. Co. Lit. 413; 1 Chit. Pl. 270, 568; Bac. Abr. Pleas, &c. (I), 3; Com. Dig. Pleader, (E. 26); Coryton v. Lithebye, 2 Saund. 116 a; *Ld. Arlington v. Merrike*, 3 Do. 411, n (4); *Mints v. Bethil*, 2 Cro. (Eliz.) 749; *Cornwallis v. Savery*, 2 Burr. 772; *J'Anson v. Stuart*, 1 T. R. 753; *Barton v. Webb*, 8 T. R. 459; *Shum v. Farrington*, 1 Bos. & Pul. 640; *Hill v. Montagn*, 2 M. & S. 378.)

Thus, in assumpsit upon a promise that in consideration that the plaintiff would *do his endeavor, and labor* to persuade his nephew to marry the niece of the defendant, the defendant would pay the plaintiff a named sum, the plaintiff having in his declaration averred that on such a day, and divers other days and times, *in every way that he could, he did his endeavor and labored to persuade* his said nephew to marry the defendant's said niece; it was held to be a good declaration, without showing in particular *how he did his endeavor*; for if he should set forth his several speeches to his nephew in the praise of the young lady, or the advantages of a married life, &c., the record would be too long! (Bac. Abr. Pleas, &c. (I.) 3; *Aglionby v. Towerson*, T. Raym. 400.) So in assumpsit, the plaintiff declares that in consideration the plaintiff would find and provide for a sick man, all such necessaries as he should want, the defendant promised to pay, &c.; and avers that he *had found him necessaries amounting to such a sum*, &c.; and it was held to be a good declaration, without showing in particular what those necessaries were, for that would make the record too prolix. (Bac. Abr. Pleas, &c. (I.) 3; *Crips v. Bainton*, 3 Bulstr. 31) Again, in assumpsit for labor, skill and medicines in curing defendant of a distemper, defendant having pleaded infancy, the plaintiff replied that it was *for necessaries generally*; and upon demurrer, the replication was adjudged to be good, notwithstanding it did not assign in certain how or in what manner the medicines were necessary, because that would have led to prolixity. (Bac. Abr. Pleas, &c. (I.) 3; *Huggins v. Wiseman*, Carth. 110.) Then again, in an action on the case for setting the plaintiff's house on fire, whereby, amongst divers other goods, he lost his "*horse-furniture*," it was held after verdict to be certain enough, for a man cannot be supposed to know the certainty of his goods when his house is burned. It was intimated, indeed, by one of the judges, that *divers goods* would have been in such a case sufficient description, although that phrase would be too vague in an action of *trover*, or of *trespass*, because the defendant could not justify unless the par-

particulars were specified, and because, moreover, the recovery could not be pleaded in bar of another action touching the same goods. (Bac. Abr. Pleas, &c. (I.) 3; *Wiatt v. Essington*, 2 Ld. Raym. 1410; *Bertie v. Pickering*, 4 Burr 2456.) So an assignment of the breach of a guardian's bond, "that the guardian failed to collect sundry sums of money due said ward, and also in spending and wasting the estate of the said ward," is not too general. (*Darland v. Justices of Mercer*, 4 Bibb (Ky.), 523; *Pendleton v. Bank of Kentucky*, 1 Monr. (Ky.) 176. See also *Shum v. Farrington*, 1 Bos. & P. 640; *Barton v. Webb*, 8 T. R. 459.)

- 7<sup>a</sup>. A general Mode of Pleading is often Sufficient, *where the Allegation on the Other Side must reduce the Matter to a Certainty.*

Of this rule we have already seen several illustrations, in connexion with the averment of the performance of conditions in bonds. (*Ante*, p. 986 & seq.) It will be remembered that the general rule as to *certainty* requires that the time and manner of such performance should be specially shown; but that, by virtue of the rule now under consideration, it may and ought in some instances, in order to avoid *prolixity*, to be alleged in general terms only; the requisite certainty of issue being in such cases secured by casting upon the plaintiff the necessity of showing in his replication, a special breach of the condition. The three exceptional instances in which this general mode of alleging performance of conditions is allowed, were in the passage referred to, mentioned as follows: (1), Where the subject comprehends a *great multiplicity of particulars*; (2), Where, upon a condition to indemnify the plaintiff, the plea is *non damnificatus*; and (3), Where the condition is for the performance of matters set forth in another instrument, which matters are neither in the negative, nor in the disjunctive. And of these, as was there promised, a somewhat more copious exposition will here be made.

- 1°. Where the Subject comprehends a *great Multiplicity of Particulars.*

It is evident that if, where the condition or covenant contains a multiplicity of particulars, the performance of each one were required to be alleged with certainty, a very inconvenient prolixity would ensue, and hence it is that a general averment of performance suffices; whilst the other party, the plaintiff for instance, brings about the needful particularity in the issue, by distinctly setting forth in his next pleading the breaches of the condition or covenant of which he complains. (St. Pl. 359; 1 Chit. Pl. 270, 568; 1 Sand. 117, n (1); 3 Do. 411, n (4); Bac. Abr. Pleas, &c., (I.) 3; Com. Dig. Pleader, (E. 26); (2 V. 13), (2 W. 33); *Acton v.*



Hill, 1 Cro. (Eliz.), 253; Mints v. Bethil, 2 Cro. (Eliz.), 749; Wimbleton v. Holdrip, 1 Lev. 303; J'Anson v. Stuart, 1 T. R. 753; Cornwallis v. Savery, 2 Burr. 772.)

Thus, in Acton v. Hill, 1 Cro. (Eliz.), 253, in an action of debt on a bond conditioned to account for subsidies (taxes) collected, a plea on the part of the defendant that he *had accounted* was held to be good. And in Mints v. Bethil, 2 Cro. (Eliz.), 749, in debt upon a bond conditioned to deliver to the plaintiff upon request, all the fat and tallow of all beasts which he should kill before such a day, a plea by the defendant that, upon every request made, *he had delivered to the plaintiff* all the fat and tallow of all the beasts which were killed by him before the said day, was upon demurrer held to be sufficient.

2°. Where upon a Condition to indemnify the Plaintiff, the Plea is *Non Damnificatus*.

Such a plea is in the nature of a plea of performance; being used where the defendant means to allege that the plaintiff has been kept harmless and indemnified, according to the tenor of the condition; and it is pleaded in *general terms*, without showing the particular manner of the indemnification; the plaintiff's replication being expected to set forth the particulars wherein he has been damnified. (St. Pl. 360; 1 Chit. Pl. 568, 616; 3 Do. 983, & n (g); Bac. Abr. Pleas, &c., (I), 3; Com. Dig. Pleader, (E. 25), (2 V. 13), (2 W. 33); 1 Saund. 117, n (1); Cutlar v. Southern, 1 Lev. 194; Manser's Case, 2 Co. 4 a, & n (P) & (Q); Codner v. Dalby, 3 Cro. (Jac.), 363; Cox v. Joseph, 5 T. R. 309, 10.)

Thus, in an action of debt on a bond conditioned to "acquit, discharge, and save harmless the church wardens of the parish of P. and their successors, from all manner of costs and charges, by reason of the birth and maintenance of a certain child," if the defendant means to rely on the performance of the condition, he may plead in the general form, "that the church wardens of the said parish, or their successors, from the time of making the said writing obligatory, *were not in any manner damnified* by reason of the birth or maintenance of the said child," and it will then be for the plaintiff to show in the replication, how the church wardens were damnified. (Richards v. Hodges, 2 Saund. 84, & n (1); Hayes v. Bryant, 1 H. Bl. 253.) And so, if in an action of debt upon a bond conditioned to *save the plaintiff harmless*, as bail in such an action, the defendant pleads that plaintiff *was not damnified as bail in that action*, it is good. (Codner v. Dalby, 3 Cro. (Jac.) 363.)

But with respect to the plea of *non damnificatus*, the following distinctions are to be noted:

(1), That if the condition of the bond be not to *indemnify and save harmless*, but to *discharge*, or to *acquit* the plaintiff from a particular thing, the plea of *non damnificatus* will not apply; but the defendant must plead performance specially, "that he discharged and acquitted the plaintiff, &c. ; and must also show *the manner* of such acquittal and discharge. But on the other hand, if a bond be conditioned to "discharge and acquit the plaintiff from *any damage*," by reason of a certain thing, *non damnificatus* may then be pleaded, because that is in truth the same thing with a condition to "indemnify and save harmless." (St. Pl. 362; 1 Saund. 117, n (1); White v. Cleaver, 2 Stra. 681; Harris v. Pett, 5 Mod. 243.)

(2), That if the condition does not use the words "*indemnify*," or "*save harmless*," or some equivalent term, but stipulates for the performance of some *specific act*, although the act is intended to be by way of indemnity, such as the payment of a sum of money by the defendant to a third person, in exoneration of the plaintiff's liability to pay the same sum, the plea of *non damnificatus* is improper; and the defendant should plead performance specifically, as "that he paid the said sum," &c. (St. Pl. 362; 1 Saund. 117, n (1); Manser's Case, 2 Co. 4 a, n (Q); Mather v. Mills, 3 Mod. 252; Harris v. Pett, 5 Mod. 244; Holmes v. Rhodes, 1 Bos. & P. 640; Archer v. Archer, 8 Grat. 539.)

(3), That if, instead of pleading negatively, *non damnificatus*, the defendant alleges affirmatively, that he has "*saved harmless*," the plea is bad, unless he proceeds to show specifically *how* he saved harmless. (St. Pl. 361; 1 Saund. 117, n (1); Archer v. Archer, 8 Grat. 539.)

3°. Where the Condition is for the Performance of *Matters set forth in Another Instrument*, which Matters are neither in the *Negative* nor in the *Disjunctive*.

Where a bond is conditioned for the performance of covenants, or other matters *contained in an indenture or other instrument collateral to the bond, and not set forth in the condition*, the law often allows (upon the same principle of avoiding prolixity,) a general plea of performance, without setting forth the manner of it. (St. Pl. 363; Bac. Abr. Pleas, &c. (I), 3; Com. Dig. Pleader (2 V. 13); 1 Saund. 117, n (1); 3 Do. 410, n (3); Mints v. Bethil, 2 Cro. (Eliz.) 749; Earl of Kerry v. Baxter, 4 East. 340, and note stating case of Plumer v. Raine.)

Thus, in an action on a bond conditioned for fulfilling all and singular the covenants, articles, clauses, provisos, conditions and agreements contained in a certain inden-

ture, on the part and behalf of the defendant, which indenture contains covenants of an affirmative kind only, it is sufficient to plead (after setting forth the indenture), that the defendant always hitherto *hath well and truly observed and fulfilled* all and singular the covenants, articles, clauses, provisos, conditions, and agreements contained in the said indenture, on the part of said defendant to be observed, performed, &c. (*Gainsford v. Griffith*, 1 Saund. 55.)

Again, in an action of debt on a bond payable to the postmaster-general, conditioned faithfully to perform the duties of a deputy postmaster, and to observe *the instructions given him* (which were faithfully and promptly to deliver all letters and packets which should come to him officially), it is sufficient for the defendant to plead (after craving *oyer* of the bond, and of the condition, and setting forth the instructions,) that he has faithfully performed his duties as a deputy postmaster, and observed the instructions of the postmaster-general, without showing the manner of performance. (St. Pl. 363; *Lord Arlington v. Merricke*, 3 Saund. 403, 409-'10, & n (3).)

But the adoption of a mode of pleading so general as in these examples, will be improper where the covenants or other matters mentioned in the collateral instrument are either *in the negative* or *in the disjunctive form*; and with respect to such matters the allegation of performance should be more specially made, so as to apply exactly to the tenor of the collateral instrument. (St. Pl. 365; *Ld. Arlington v. Merricke*, 3 Saund. 410, and n (3); *Gallies v. Budbery*, 1 Cro. (Eliz.) 62; *Oglethorpe v. Hyde*, 1 Cro. (Eliz.) 233.) Thus, in the example above given of a bond conditioned for the performance of the duties of a deputy postmaster, and for observing the instructions of the postmaster-general, if, besides those in the *positive form*, some of these instructions were *in the negative* (as, for example, "you *shall not receive* any letter, &c., addressed to any seaman, or any private soldier, unless you be first paid for the same"), it would be improper to plead merely that the defendant faithfully performed the duties of the office of deputy postmaster, and all the instructions received from the postmaster-general. Such a plea will apply sufficiently *to the positive*, but *not to the negative* part of the instructions. The form of the plea, therefore, should be, that "the said defendant, from the time of making the said writing obligatory, hitherto hath well, truly and faithfully performed all and every the duties belonging to the said office of deputy-postmaster, and faithfully and exactly observed, performed, and fulfilled all and every the instructions, &c., according to the true intent and meaning of the said in-

structions. And the said defendant further says, that from the time aforesaid he did not receive any letters, &c., directed to any seaman or private soldier, &c., unless he, the said defendant, was first paid for the same." (St. Pl. 365-'6; *Ld. Arlington v. Merricke*, 3 Saund. 410, & n (3).) And the case is the same where the matters mentioned in the collateral instrument are *in the disjunctive* or alternative form; as where the defendant engages to do either one thing or another. Here also a general allegation of performance is insufficient, and he should show which of the alternative acts was performed. (St. Pl. 366; *Oglethorpe v. Hyde*, 1 Cro. (Eliz.), 233.)

The reasons why the general allegation of performance does not properly apply to *negative or disjunctive* matters, are that where the matter is negative, the plea would be indirect, or *argumentative* in its form; and where it is disjunctive, it would be *equivocal*; and would in either case, therefore, be liable to objection in reference to certain rules of pleading, which we shall see in the next section are directed against averments either argumentative or ambiguous. (St. Pl. 366.)

It is a well understood doctrine of the common law, that where a party founds his answer upon any matter not set forth by his adversary, but contained in a deed of which the latter makes *profert*, (or in Virginia without *profert*, which the statute declares it shall not be necessary to make, V. C. 1873, c 167, § 9,) he must demand *oyer* of such deed, and set it forth *verbatim*. In pleading performance, therefore, of the condition of a bond, where (as formerly, was generally the case, and sometimes is now,) the plaintiff has stated in the declaration nothing but the bond itself, without the condition, it is necessary for the defendant to demand *oyer* of the condition, and thus cause it to be spread *verbatim* upon the record. And where the condition is for performance of matters contained in a *collateral* instrument, it is necessary; not only to demand *oyer* of the condition of the bond, but also to make *profert* and demand *oyer* of and set forth the whole substance of the collateral instrument; for otherwise it will not appear that the instrument did not stipulate for the performance of negative or disjunctive matters; and in that case the general plea of performance of the matters therein contained would (as above shown) be improper. (St. Pl. 367; 3 Saund. 410, n (2).)

8<sup>d</sup>. No Greater Particularity is required than the *Nature of the Thing Pleaded will Conveniently Admit*.

Thus, though for the most part in an action for taking goods, or for injury thereto, the *quantity* of the goods must be stated, so that a declaration saying merely "divers goods

and chattels of the plaintiff" is bad; yet if, under the circumstances, they cannot be conveniently ascertained by number, weight, or measure, such certainty is not required. (St. Pl. 367-'8; Bac. Abr. Pleas, &c. (B), 5.)

Accordingly, in trespass for breaking the plaintiff's close with beasts, and *eating his peas*, a declaration is good, although it does not show the quantity of peas, "because nobody can measure the quantity of peas that beasts can eat." (Bac. Abr. Pleas, &c. (B), 5.) So in an action on the case for setting the plaintiff's house on fire, whereby he lost *ornatus et equis aratris, et carucis*, it was held certain enough; for when a man's house is burnt, he cannot set forth with certainty the goods he lost. (Bac. Abr. Pleas, &c. (B), 5; Prior v. Dawkes, Keb. 825.) And so a declaration is good which, in an action against an officer conducting an election for a false return, avers that the plaintiff was chosen *by the greater number of voters*, without showing the number; for perhaps (in England) he may have been elected by voices, or by holding up of hands, and not by the number of persons in certain (that is, *by a poll*), in which case it is easy to determine who has the majority of voices or hands, and yet very difficult to know the certain number, or the names of them. (St. Pl. 368-'9; Buckley v. Thomas, 1 Plowd. 123.) In like manner, if one is bound to shear annually the sheep of the obligee, he shall say that he has shorn them annually, without mentioning the number, for perhaps some years there are more, and some less, and so he cannot be intended to remember the certain number annually. (1 Plowd. 123.)

9<sup>d</sup>. Less Particularity is required when the *Facts lie more in the Knowledge of the opposite Party than of the Party pleading*.

Of this rule and its applications, the books afford numerous instances, notably in cases of *alleging title in one's adversary*, of which somewhat has been already said, (*Ante*, p. 978, &c.) But the principle, as it is a perfectly natural, is also a very general one. (Com. Dig. Pleader, (C. 26); Bradshaw's Case, 9 Co. 61 a; Rider v. Smith, 3 T. R. 768; Derisley v. Custance, 4 T. R. 77; Gale v. Reed, 8 East. 80.)

Thus, in an action of covenant for a breach of the covenant contained in a lease, that the lessor had full power and lawful authority to make the demise, the plaintiff, in alleging the breach, averred that the defendant had not full power and lawful authority to demise, &c., without showing what person had the right and title in the lands in question, and it was held good, because it lay more properly in the knowledge of the defendant, the lessor, what estate he himself had, than of the lessee who is a stranger to it. (Bradshaw's

Case, 9 Co. 61 a.) *Muscot v. Ballet*, 3 Cro. (Jac.) 369-'70, was a very similar case, similarly adjudged; and *Hancock v. Field*, 3 Cro. (Jac.) 170-'71, enforces the same principle. In *Gale v. Reed*, 8 East. 80, the defendant having covenanted that he would employ no one but the plaintiffs to make cordage for him, the declaration stated as a breach of the covenant that the defendant did not employ the plaintiffs to make all or any part of his cordage, and *employed divers other persons* to make the same, without saying whom, or describing the kinds and quantities of cordage made by such other parties, and it was held sufficient; because the facts alleged in these breaches, that is what other persons were employed, and what kinds and quantities of cordage they made, were more within the knowledge of the defendant than of the party pleading.

- 10<sup>d</sup>. Less Particularity is necessary in the Statement of *Matter of Inducement or Aggravation* than in the main Allegations.

Lord Coke expresses the rule in respect to inducement, thus: "That which is alleged by *way of conveyance or inducement* to the substance of the matter need not be so certainly alleged as that which is the substance itself." (3 Th. Co. Lit. 408; Com. Dig. Pleader, (C. 31), (C. 43), (E. 10), (E. 18); Bac. Abr. Pleas, &c., (B.) 4; 1 Saund. 274, n (1); Bishop of Salisbury's Case, 10 Co. 59 b, & n (B); 1 Chit. Pl. 319-'20; 567.)

This rule is exemplified in the case of the derivation of title, where, though it is a general rule *that the commencement of a particular estate must be shown*, yet an exception is allowed if the title be alleged by way of *inducement* only. (*Ante*, p. 970.) And so in trespass, the plaintiff declared that the defendant broke and entered his dwelling-house, and "wrenched and forced open the closet-doors, drawers, chests, cupboards, and cabinets of the said plaintiff." Upon special demurrer, it was objected that the number of closet-doors, drawers, chests, cupboards, and cabinets was not specified. But it was answered, "that the breaking and entering of the plaintiff's house was the principal ground and foundation of the present action; and all the rest are not the foundations of the action, but matters only thrown in to *aggravate the damages*, and on that ground need not be particularly specified." (St. Pl. 373; *Chamberlain v. Greenfield*, 3 Wils. 294.)

- 11<sup>d</sup>. With respect to *Acts valid at Common Law*, but Regulated as to the *Mode of Performance by Statute*, it is sufficient to use such *Certainty of Allegation as was sufficient before the Statute*.

This rule is accompanied by a counterpart, namely, that where the power to do an act was *originally granted by*

*statute*, it must be shown in pleading, that the *act was done according to the direction of the statute*, and of every subsequent statute relative to the subject. (Bac. Abr. Statute, (4), 3.) Thus, by the statute of frauds in England (29 Car. c. 3, § 1, 2, 3), no lease exceeding *three years*, and by the Virginia statute of conveyances (V. C. 1873, c. 112, § 1), none exceeding *five years*, may be made or assigned except *by deed*, (or, as the English statute has it, *by deed or writing*); yet, in a declaration of debt for rent on a demise, it is sufficient (as it was at common law) to state a demise for any number of years, without showing it to have been in writing; though where the lease is by indenture, the instrument is, in practice, usually set forth. (St. Pl. 374; Birch v. Bellamy, 12 Mod. 540; Duppa v. Mayo, 1 Saund. 276, & n (1) & (2); Forth v. Stanton, 1 Saund. 211, & n (2).) And so, in the case of a promise to answer for the debt, default, &c., of another person, which at common law was good *by parol*, but by the statute of frauds (§ 4), and by our corresponding statute of parol agreements (V. C. 1873, c. 140, § 1, (cl. 4)), is not capable of enforcement by action, unless the promise, &c., be in writing, and signed by the party to be charged thereby, or his agent, the declaration on such promise need not *allege* a written contract, although of course a written one must be proved. (St. Pl. 374; 1 Saund. 211, n (2); 1 Saund. 276 d, e, n (2); Anon. 2 Salk. 519; Chalie v. Belshaw, 6 Bingh. (19 E. C. L.) 529.)

But where a thing is *originally made* by statute, it must be pleaded with all the circumstances required by the statute, as stated above. Thus, a will of lands must be pleaded to be in writing, because the statute of wills so requires, and it must be alleged to have been executed with all the forms prescribed by the statute in force at the time it was made. (Bac. Abr. Stat. (L), 3; Birch v. Bellamy, 12 Mod. 540; Anon. 2 Salk. 519.)

In respect to this rule, a distinction is taken between a declaration and a plea. In a *declaration* the plaintiff need not show the act, which was good at common law, to be in writing according to the statute; but in a *plea* it must be so stated. Thus, when the defendant pleads that another person, for a sufficient consideration, promised to be answerable to the plaintiff for the debt, it was held that it must be shown to be in writing, so that it may appear to be a contract which the *plaintiff can enforce*. (St. Pl. 375-6; Case v. Barber, T. Raym. 450; 1 Saund. 276 e, n (2); Id. 211 b, n (i).)

The writer is not disposed to controvert the reasonableness and propriety of this distinction between the mode of pleading, in the circumstances supposed, in a declaration

and in a plea; but notwithstanding the extraordinary sanction which the case cited has received, not only in the judgment itself, but in the approval of it by two such authorities as Mr. Serg't Williams and Mr. Stephen, it seems still to be worthy of consideration, whether the defendant in *Case v. Barber* was *discharged* necessarily by the undertaking of the third person (who was his son) to pay the debt; and if he was so discharged, whether the promise of such third person, supposing it to have been founded on a valuable consideration, was not an *original*, and *not a collateral* promise, and therefore not within the statute, nor required to be in writing. See 1 Saund. 211 a, n (e), 211 e, n (i); *Goodman v. Chase*, 1 B. & Ald. (4\* E. C. L.) 303; *Browning v. Stollard*, 5 Taunt. (1 E. C. L.) 450; *Smith Cont.* (6th ed.) 96 & seq. and Author's notes.

## SECTION V.

*Of Rules which tend to Prevent Obscurity and Confusion in Pleading.*5<sup>b</sup>. Rules which tend to prevent *Obscurity and Confusion in Pleading.*

•The importance of preventing obscurity and confusion in pleading is too obvious to need illustration. The rules which tend to secure that result are stated by Mr. Stephen thus: (1), Pleadings must not be insensible nor repugnant; (2), They must not be ambiguous or doubtful in meaning; and when two different meanings present themselves, that construction shall be adopted which is most unfavorable to the party pleading; (3), They must not be argumentative; (4), They must not be in the alternative; (5), They must not be by way of recital, but must be positive in their form; (6), Things are to be pleaded according to their legal effect or operation; (7), Pleadings should observe the known and ancient forms of expression, as contained in approved precedents; (8), They should have their formal commencements and conclusions; and (9), A pleading which is bad in part is bad altogether;  
W. C.

1<sup>c</sup>. RULE I. PLEADINGS MUST NOT BE INSENSIBLE NOR REPUGNANT.

The design of pleading being, as Lord Hale says, "*to render the fact plain and intelligible*," (Hale's Hist. Com. Law, 212), it would be an extraordinary anomaly indeed, if the allegations were allowed to be either without meaning, or repugnant in their averments. (Com. Dig. Pleader, (C. 23); Bac. Abr. Pleas. &c. (I), 4; St. Bl. 377; 1 Chit. Pl. 265 & seq.) Let us, therefore, observe that pleadings must not be, (1), Insensible; nor (2), Repugnant;



W. C.

1<sup>d</sup>. Pleadings *must not be Insensible.*

If a pleading be *insensible* (that is, *unintelligible*), as by the omission of material words which the context does not suggest, or by blanks in the statement of what is material, it is bad. (St. Pl. 377; Com. Dig. Pleader, (C: 23); Wyat v. Aland, 1 Salk. 324, Lawly v. Gattacre, 3 Cro. (Jac.) 498.) In Wyat v. Aland, 1 Salk. 324, Lord Holt states the doctrine to be that where a matter set forth is grammatically right, but absurd in the sense, and unintelligible, we *cannot reject some words to make sense of the rest*, but must take them as they are; for there is nothing so absurd or nonsensical but what, by rejecting and omitting, may be made sense; but where a matter is nonsense by being contradictory and repugnant to somewhat precedent, there the precedent matter which is sense shall not be defeated by the repugnancy which *follows*, but that which is contradictory shall be rejected; as in ejectment, where the declaration is of a demise the *second* of January, and that the defendant *afterwards*, to wit, on the *first* of January ejected him. Here the *scilicet*, or to wit, and what follows may be rejected as being expressly contrary to the *afterwards* in the preceding clause. But see King v. Stevens, 5 East. 244.

2<sup>d</sup>. Pleadings *must not be Repugnant.*

It is ground for demurrer if a pleading be inconsistent with itself, or *repugnant*. (St. Pl. 377; Com. Dig. Pleader, (C: 23); Bac. Abr. Pleas, &c. (I), 4.)

Thus where, in an action of trespass, the plaintiff declared for taking and carrying away certain timber, lying in a certain place, *for the completion of a house then lately built*,—the declaration was considered bad for *repugnancy*; for the timber could not be *for the building of a house already built*. (Lawley v. Arnold, cited Nevil v. Loper, 1 Salk. 213.) So in covenant against an apprentice, where the breach assigned was that *during the time in which he served*, the defendant departed from the master's service, the declaration was held to be bad, for repugnancy. (Nevil v. Loper, 1 Salk. 213.) In like manner, where the defendant *pleaded* the grant of a rent out of a *term for years*, and proceeded to allege that by virtue thereof he was seised *as of freehold*, for the term of his life, the *plea* was held bad for repugnancy. (Butt's Case, 7 Co. 25 a.) And so if a *replication* demand the whole sum at first claimed, and yet acknowledge satisfaction of part, it is repugnant and demurrable. (Vigers v. Aldrich, 4 Burr. 2483.)

If, however, the repugnant clause be merely superfluous and redundant, so that it may be rejected without materially altering the general sense and effect, it does not vitiate the

pleading,—at least if laid under a *videlicet*,—according to the maxim *utile per inutile non vitiatur*. (St. Pl. 378; Bac. Abr. Pleas, &c. (I), 4; Dakin's Case, 3 Saund. 290 a, & 291, n (1); Id. 306, n (14); King v. Stevens, 5 East. 244.)

**2°. RULE II. PLEADINGS MUST NOT BE AMBIGUOUS OR DOUBTFUL IN MEANING; AND WHEN TWO DIFFERENT MEANINGS PRESENT THEMSELVES, THAT CONSTRUCTION SHALL BE ADOPTED WHICH IS MOST UNFAVORABLE TO THE PARTY PLEADING.**

"The plea of every man shall be construed strongly against him that pleadeth it. for every man is presumed to make the most of his own case; *ambiguum placitum interpretari debet contra proferentem*." (3 Th. Co. Lit. 408.) And the rule is sustained and illustrated by numerous authorities. (St. Pl. 378 & seq; Com. Dig. Pleader, (E. 3), (E. 6); Dovaston v. Payne, 2 H. Bl. 529 & seq; Thornton v. Adams, 5 M. & S. 39, 40; Ld. Huntingtower v. Gardiner, 1 B. & Cr. (8 E. C. L.) 297; Fletcher v. Pogson, 3 B. & Cr. (10 E. C. L.) 192; Hobson v. Middleton, 6 B. & Cr. (13 E. C. L.), 295.)

Thus, in trespass *quare clausum fregit*, if the defendant pleads that the *locus in quo* was his freehold, he must say *at the time of the trespass*, or else the plea is bad. And in debt upon a bond conditioned to make an assurance of land, if the defendant pleads that he executed a release, it is bad, if he does not show that *it concerns the same bond*. (Com. Dig. Pleader, (E. 5); Manser's Case, 2 Co. 4 a.) So, in an action of trespass *quare clausum fregit*, for breaking down certain designated gates and hedges, a plea alleging matter of justification must show that it applies *to the same gates and hedges* in respect to which the plaintiff complains. (St. Pl. 379; Com. Dig. Pleader, (E. 5); Goodday v. Michell, 1 Cro. (Eliz.) 441.)

A pleading however, is not objectionable as ambiguous or obscure, if it be *certain to a common intent*, that is, if it be clear enough according to reasonable construction, though not worded with absolute precision. (St. Pl. 380; Com. Dig. Pleader, (E. 7), (C. 24), (F. 17); 1 Chit. Pl. 268; 3 Th. Co. Lit. 361, & n (B); 1 Saund. 49, n (1); Dovaston v. Payne, 2 H. Bl. 530; King v. Lyme Regis, 1 Dougl. 158; Rex v. Horne, Cowp. 682; Colthirst v. Bejushin, 1 Plowd. 33; Spencer v. Southwich, 9 Johns. (N. Y.) 314; Hines v. Ballard, 11 Johns. 491; Roosevelt v. Kellogg, 20 Johns. 208; Van Ness v. Hamilton, 19 Johns 349.)

Thus, in debt on a bond conditioned that the plaintiff shall enjoy certain land, &c., a plea that after the making of the bond until the day of instituting the suit, the plaintiff *did enjoy*, is good, though it be not said that *always after the making*, until, &c., he enjoyed; for this shall be intended. (St. Pl. 380; Harlow v. Wright, 4 Cro. (Car.) 105.)

To this head of ambiguity the doctrine of *negatives pregnant* belongs. A *negative pregnant* is a form of negative expression which *implies* an affirmative. This is a fault in pleading, because, contrary to the rule under discussion, it *involves an ambiguity*. In trespass for entering the plaintiff's house, the defendant pleaded that the plaintiff's daughter licensed him, &c., and that he entered by that license. The plaintiff replied that *he did not enter by her license*. This was considered a *negative pregnant*, carrying with it, by implication, the apparent admission that the license was given, but that the defendant did not enter by such license, and therefore *pregnant with that admission*; and it was held that, in order to avoid the ambiguity thence arising, the plaintiff should have traversed the entry by itself, or the license by itself, and not both together. (*Myn v. Cole*, 3 Cro. (Jac.) 87; Bac. Abr. Pleas, &c. (I), 6.) So, in a case in the Year Books (for thus early is the rule against negatives pregnant), in an action for negligently keeping a fire, by which the plaintiff's houses were burned, the defendant pleaded that the plaintiff's houses *were not burned by the defendant's negligence in keeping his fire*; and it was objected that "the traverse was not good, for it has two intendments: one that the houses were not burnt; the other, that they were burnt, but not by negligent keeping of the fire, and so it is a *negative pregnant*." (St. Pl. App'x, xciii; 28 Hen. VI, 7.) Another example is the following: In trespass for assault and battery, the defendant justified for that he, being the master of a ship, gave a lawful order to the plaintiff, which he refused to obey, whereupon the defendant *moderately chastised him*. The plaintiff traversed the plea with an *absque hoc*, that the *defendant moderately chastised him*; and this traverse was held to be a *negative pregnant*, for while it apparently means to put in issue only the question of excess, (admitting by implication the lawfulness of the chastisement,) it does not necessarily and distinctly make that admission, and is therefore ambiguous in its form. (St. Pl. 382; *Auberie v. James*, Vent. 70.) If the plaintiff had replied to the plea *that the defendant immoderately chastised him*, the objection would have been avoided. The proper form of traverse, however, would have been *de injuria sua propria absque tali causa*. This, by traversing the whole "cause alleged," would have distinctly put in issue all the facts in the plea, and no ambiguity or doubt as to the extent of the denial would have arisen. (St. Pl. 382.)

But in modern times, the rule against a *negative pregnant* has received no very strict construction. Thus, in debt on a bond conditioned to perform the covenants in an indenture of lease, one of which covenants was that the defendant, the

lessee, would not deliver possession to any but the lessor, or to such persons as should lawfully evict him, the defendant pleaded that he *did not deliver the possession to any but such as lawfully evicted him*. And although, on demurrer to this plea, it was objected that it was a *negative pregnant*, and that the defendant ought to have said that such an one lawfully evicted him, to whom he delivered the possession, or that he did not deliver the possession to any; yet the court held the plea, as *pursuing the words of the covenant*, to be good (being in the negative), and that the plaintiff ought to have replied and assigned a breach. (St. Pl. 383; Com. Dig. Pleader, (R. 6); Pullin v. Nicholas, 1 Lev. 83.)

### 3<sup>c</sup>. RULE III. PLEADINGS MUST NOT BE ARGUMENTATIVE.

The objects of pleading manifestly require that every averment shall be direct and positive, and *not by way of argument or rehearsal*. (St. Pl. 384; 3 Th. Co. Lit. 408; Bac. Abr. Pleas, &c. (I), 5; Com. Dig. Pleader, (E. 3); 5 Rob. Pr. 296 & seq.)

Thus, in an action of trespass for taking and carrying away the defendant's goods, the defendant pleaded that the plaintiff *never had any goods*, which was held to be no plea, although the court remarked that it was an infallible *argument* that the defendant was not guilty. (St. Pl. 385; Greenlife v. W—, 1 Dy. 43 a.)

So, if it is designed to draw in question any *quantity or extent*, the fact should be averred positively, and not the *evidence* which merely goes to prove such quantity or extent, for the latter is argumentative. (Ledsham v. Lubram, 2 Cro. (Eliz.) 870; St. Pl. 384.) Indeed, it may be stated generally, that a pleading setting forth the evidence of facts, instead of the facts themselves, is always argumentative, and bad. (Bac. Abr. Pleas, &c. (I), 5; 5 Rob. Pr. 296 & seq; Church v. Gilman, 15 Wend. (N. Y.), 650; Fitler v. Delavan, 20 Wend. 57; Neville v. Kelly, 12 Com. B. N. S. (104 E. C. L.) 747.) Thus, in a *plea* it is not allowable to say that by a certain indenture *it is witnessed* that A demised, &c.; but it must be averred directly that *he did demise*, although in a declaration a similar mode of pleading is admitted, because it is said to be only the *inducement* to the action, whilst it is the *substance* of the plea. (Jones v. Weaver, 2 Dy. 118 a; 1 Saund. 247, n (1); 3 Saund. 319, & n (5); Wilson v. Jeffery, 1 Cro. (Eliz.) 195.)

In pursuance of these principles it was held that where, in an action of assumpsit, the plaintiff stated a *reasonable ground for a promise*, (but averred none), and in the breach he alleged that notwithstanding *defendant's promise*, he had not paid the demand, even after a verdict for the plaintiff, judg-

ment was arrested because the plaintiff *had alleged no direct promise to pay*. (Winston v. Francisco, 2 Wash. 187.) And so, in an action of assumpsit, where the plaintiff in his declaration set forth defendant's promissory note *verbatim*, but averred *no promise to pay*, it was held on demurrer to be insufficient, although the plaintiff alleged that the defendant *made the note*. (Cooke v. Simms, 2 Call. 47.)

The two cases last cited disregard the distinction above referred to (which notwithstanding seems well founded), between the strictness required in a declaration and in a plea; and Winston v. Francisco is quite at war with the whole tenor of authority in holding argumentativeness not to be cured by the verdict. Indeed, the better opinion seems to be, that it is so much an error of form as not to avail even on general demurrer, and much less on motion in arrest of judgment. (Com. Dig. Pleader, (E. 3); Bac. Abr. Pleas, &c. (I), 5; Bennet v. Holbech, 3 Saund. 319, 319 c; Spencer v. Southwick, 9 Johns. (N. Y.) 314.)

It will be remembered, that it is this rule against argumentativeness which occasions the resort to the *absque hoc* in the special traverse. (*Ante*, p. 902.)

The prohibition of argumentative pleading leads to two subordinate rules which must now be mentioned, namely, (1), That *two affirmatives* do not make a good issue; and (2), That *two negatives* do not make a good issue;  
W. C.

1<sup>d</sup>. Two Affirmatives do not Make a good Issue.

It is obvious that the traverse by the second affirmative is argumentative in its nature. Thus, if it be alleged by the defendant that a party died *seised in fee*, and the plaintiff traverse that averment by alleging that he died *seised for life*, this is not a good issue, because, although the latter allegation amounts to a denial of a seisin in fee, yet it denies it *by argument or inference only*. If for any cause the plaintiff wishes to allege that the party in question died seised for life, he must add *absque hoc that he died seised in fee*, and thus resort to the form of a special traverse. (St. Pl. 385-'6; Com. Dig. Pleader, (R. 3); Bac. Abr. Pleas. &c., (H), 3; 3 Th. Co. Lit. 442.)

2<sup>d</sup>. Two Negatives do not make a Good Issue.

Thus, if the defendant plead that he requested the plaintiff to deliver an abstract of his title, but that the plaintiff, when so requested, *did not deliver such abstract*, but neglected so to do, the plaintiff ought not to reply that he *did not neglect and refuse* to deliver such abstract, but should allege affirmatively *that he did deliver*. (Com. Dig. Pleader, (R. 3); St. Pl. 386-'7; Martin v. Smith, 6 East. 555, 557.)

## 4°. RULE IV. PLEADINGS MUST NOT BE IN THE ALTERNATIVE.

Thus, if in an action for slander, it be averred that the defendant by words, *or* by words coupled with acts, slandered the plaintiff in his trade, it is error which in England is not even cured by verdict, but is ground for arresting the judgment, (*Cook v. Cox*, 3 M. & S. 114-'15); and although in Virginia it is apprehended that our statute of *jeofails* would cure the mistake after verdict, unless the declaration had been demurred to, yet there seems to be no doubt that on demurrer it would be fatal.

And where, in an action of debt against a jailor for the escape of a prisoner, the defendant pleaded that *if* the prisoner did escape, it was without the knowledge of the defendant, and against his will; and that, *if* there were any such escape, the prisoner voluntarily returned into custody before the defendant knew of the escape, &c.; the plea was held to be bad, for he "cannot plead *hypothetically*," thus; but must either stand upon an averment that there has been no escape, or that there have been one or more escapes, after which the prisoner returned. (*Griffith's v. Eyles*, 1 Bos. & P. 418.) So, where it was charged that the defendant wrote and published, *or* caused to be written and published, a certain libel, it was considered bad for the uncertainty. (*St. Pl.* 388; *The King v. Brereton*, 8 Mod. 330.)

## 5°. RULE V. PLEADINGS MUST NOT BE BY WAY OF RECITAL, BUT MUST BE POSITIVE IN THEIR FORM.

This fault in pleading is peculiarly liable to occur in actions of trespass for torts, where the declaration begins the statement of the cause of action with a *quod cum*, "For that whereas." As the declaration in such actions sometimes consists of a single sentence, an averment thus introduced is apt, unless care be used, to continue in the same strain of recital to the end. Thus where the plaintiff in an action of trespass "complains of the said D. D., *for that whereas*, the said defendant, at the county of A aforesaid, on the — day of — in the year of our Lord —, with force and arms assaulted the said plaintiff, and with great force and violence seized the said plaintiff by his nose, and greatly squeezed and pulled the same, and other wrongs to the said plaintiff then and there did against the peace of the commonwealth, and to the damage of the said plaintiff \$—: and therefore he brings his suit;" it is manifest that nothing is positively asserted, the whole complaint being made recital only, by the *whereas* in the beginning. (*St. P.* 388; *Bac. Abr. Pleas, &c.* (B), 5, 4; *Id. Trespass*, (I), 2, 19; 1 *Chit. Pl.* 421-'2; *Gould's Pl.* 65, 73, &c.)

It is a flagrant error in pleading, still certainly fatal on

demurrer, and formerly in arrest of judgment also, and on writ of error. (Ballard v. Leavell, 5 Call. 533; Hord v. Dishman, 2 H. & M. 601; Moore v. Downey, 3 H. & M. 134; Cooke v. Simms, 2 Call. 48; Lomax v. Hord, 3 H. & M. 276, and reporter's note; Donaghue v. Rankin, 4 Munf. 261; Sexton v. Holmes, 3 Munf. 566; Syme v. Griffin, 4 H. & M. 280.) It is supposed, however, to be cured by our present statute of *jeofails* in Virginia, so as not to be available in arrest of judgment or on writ of error. (V. C. 1873, c. 177, § 3.) See Ring v. Roxbrough, 2 Cr. & Jerv. 420.

The error most frequently occurs, as was observed above, in actions of trespass for torts, by reason of the brevity of the declaration; but it may, and does sometimes find a place in actions *ex contractu*. Thus, of the cases just cited, Sexton v. Holmes, 3 Munf. 566, and Syme v. Griffin, 4 H. & M. 280, are *ex contractu*, whilst all the others are *ex delicto*.

It is a deduction from this rule against stating things *by way of recital*, as it is also from Rule III, against *argumentativeness*, (*Ante*, p. 1015), that where a deed or other instrument is pleaded, it is in general not proper to allege (though in the words of the instrument itself), that *it is witnessed* (*testatum existit*) that such a party granted, &c.; but it should be stated absolutely and directly *that he granted*, &c. The student will remember, however, that a difference is established in this particular, between declarations and other pleadings. In a declaration (for example, in covenant), it is sufficient to set forth the instrument with a *testatum existit*, but not in other pleadings. The reason given is that in a declaration such statement is *merely inducement*, that is introductory to some other direct averment, as in covenant to the assignment of the breach. (St. Pl. 389; *Ante*, p. 1015; Penning v. Plat, 3 Cro. (Jac.) 383; Bultivant v. Holman, 3 Cro. (Jac.) 537.)

#### 6°. RULE VI. THINGS ARE TO BE PLEADED ACCORDING TO THEIR LEGAL EFFECT OR OPERATION.

The meaning of this rule is, that in stating an instrument or a transaction in pleading, it should be set forth, not according to its tenor, but according to its *effect in law*; and the reason seems to be that it is under the latter aspect that it must principally and ultimately be considered, and therefore to plead it in terms or form only, is an indirect and circuitous method of allegation. (St. Pl. 389-90; Bac. Abr. Pleas, &c. (I), 7; Com. Dig. Pleader, (C. 37); 1 Saund. 235 b, n (9); Chester v. Willan, 2 Saund. 96 b, & n (1), 97 b, n (2); Baker v. Lade, 3 Lev. 292; S. C. 4 Mod. 150-151; Moore Earl of Plymouth, 3 B. & Ald. (5 E. C. L.) 66; Pike v. Eyre, 9 B. & Cr. (17 E. C. L.) 909.)

Thus, if a joint tenant conveys to his co-tenant by the words "gives, grants," &c., his estate in the lands holden in jointure, though in terms a *grant*, it is not properly such at common law, but amounts to that species of conveyance called a *release*. It should, therefore, be pleaded not that he "*granted*," &c., but that he *released*, &c. (St. Pl. 390; *Chester v. Willan*, 2 Saund. 97; *Barker v. Lade*, 4 Mod. 150, 151.) And so where a tenant for life grants his estate to him in reversion, this is in effect a *surrender*, and must be pleaded as such, and not as a *grant*. (*Barker v. Lade*, 4 Mod. 151.) And where the plea stated that A was entitled to an equity of redemption, and subject thereto that B was seised in fee, and that they by lease and release granted, &c., the premises, excepting and reserving to A and his heirs, &c., a liberty of hunting, &c., it was held upon general demurrer, that as A had no legal interest in the land there could be no *reservation* to him; that the plea, therefore, alleging the right (though in terms of the deed), by way of *reservation* was bad; and that if the deed would operate as a *grant* of the right, it should have been pleaded as a *grant*, and not as a *reservation*. (St. Pl. 390-'91; *Ante*, p. 971, &c.; *Moore v. Earl of Plymouth*, 3 B. & Ald. (5 E. C. L.) 66.)

The rule in question is in its terms often confined to *deeds* and *conveyances*. It extends, however, to all instruments in writing, and contracts written or verbal; and indeed, it may be said generally, that it extends to all matters or transactions whatever, which one may have occasion to allege in pleading, and in which the outward form happens to be distinguished from the legal effect. Thus, in *Stroud v. Gerrard*, 1 Salk. 8, it was held that if to a plea of *misnomer*, the plaintiff should reply that the defendant *put in common bail* by the name in the writ and declaration, whereby she was estopped from denying that name, the replication could not be sustained, because it was as an *appearance* that the putting in of common bail operated as an *estoppel* to the plea of *misnomer*, and it should have been so pleaded. And in that case it was stated by the court, that in debt on a bail-bond, if the defendant has put in common bail, he cannot plead that he has *put in common bail*, as if he had thereby fulfilled the condition of the bond, but must aver that he *appeared at the day*; for he must plead according to the operation things have in law.

An exception is to be noted, however, in the case of a declaration for written or verbal slander, where (as the action turns on the words themselves) the words themselves must be set forth; and it is not sufficient to allege that the defendant published a libel containing false and scandalous matters *in substance*, as follows, &c., or used words *to the effect* following, &c. And if it be in a foreign language the original words



must be set forth with a translation, and an averment that the hearers understood them. (St. Pl. 391; 1 Saund, 242 n (1), (a), (b); Wright v. Clements 3 B. & Ald. (5 E. C. L.) 503; Cook v. Cox, 3 M. & S. 115; Newton v. Stubbs, 3 Mod. 71-2; Wood v. Brown, 6 Taunt. 170; Zenobro v. Axtel, 6 T. R. 163; Rex v. Beare, 1 Ld. Raym. 415; S. C. 2 Salk. 417.)

Mr. Hugh Davey Evans, in his ingenious essay on pleading (p. 188-9), considers that the rule in question, as a rule of brevity is good, but that as a rule to avoid *obscurity and confusion* it is very bad. "It is," says he, "really a rule of *uncertainty*, since it continually introduces the discussion of the question, *what is the legal effect*" of the transactions pleaded. It is submitted, however, that that question must be both discussed and determined, in order to decide the cause, and that it tends, in a very important degree, to avoid obscurity, and to promote clearness and certainty, to compel the pleader to aver what *he supposes* to be the legal effect and operation of a writing or transaction, instead of stating it according to its terms, just as he is required to state facts instead of the circumstances, which are conceived inferentially to prove them.

7°. RULE VII. PLEADINGS SHOULD OBSERVE THE KNOWN AND ANCIENT FORMS OF EXPRESSION AS CONTAINED IN APPROVED PRECEDENTS.

The forms of declaration, of which several specimens have been exhibited, (*Ante*, p. 590, 593), are couched in technical language, appropriate from very remote times, to each particular cause of action from which it would be inartificial and incorrect, and as it seems, emphatically inexpedient to deviate, (*Ante*, p. 621.) Some of the general issues also present examples of forms of expression fixed by ancient usage, (*Ante*, 640 & seq), from which it is improper to depart. (St. Pl. 392; Com. Dig. Abatement, (G. 7).)

Another illustration occurs in the mode of pleading the statute of limitations, of which, from the time of the passing of the statute (21 Jac. 1), the invariable form has been to allege *that the cause of action did not accrue within the time prescribed*, &c., and not to aver that the *promise was not made*, or the defendant *was not guilty*, within that time. And whilst in Virginia, under the statute doing away with special demurrer, (V. C. 1873, c. 137, § 32), the fault may not be capable of being reached by the authoritative censure of the court, it is *yet a fault* which is to be deplored, if it cannot be corrected, by those who agree with Chief Justice Abbott in *Dyster v. Battye*, 3 B. & Ald. 5 (E. C. L.) 448, in pronouncing judgment on this very point, that "it is important to the

administration of justice, that the usual and established forms of pleading should be observed, in order that the parties to the suit may know with certainty what is the point intended to be tried, and that the judge and jury may not be perplexed at *nisi prius* (as happened in this case), by controversy and argument upon the effect and import of the issue joined on the record."

The same eminent judge in another case observes, that "it is of great importance to follow the ancient forms of precedents; for if we depart from them in one instance, one deviation will naturally lead to another, and by degrees we shall lose that *certainty* which it is the great object of our system of law to preserve." (*Wright v. Clements*, 3 B. & Ald. (5 E. C. L.), 503.)

This rule can, of course, relate only to allegations of frequent and ordinary recurrence; and even as to these it is of rather uncertain application, as it must be often doubtful whether a given form of expression has been so fixed by the course of precedents as to admit of no variation. Indeed, that so many forms of expression have been established by long usage as preferable to all others is rather a subject of surprise, and the nicety with which they were conceived and adapted to convey the precise shade of meaning designed, or upon occasion to comprehend many particulars under one *formula*, is deemed by Mr. Reeves to be a strong mark of the refinement and curiosity with which this part of the law was cultivated. (St. Pl. 393; 3 Reeves' Hist. Eng. Law, 463-'4.)

#### 8<sup>c</sup>. RULE VIII. PLEADINGS SHOULD HAVE THEIR PROPER FORMAL COMMENCEMENTS AND CONCLUSIONS.

This rule refers to certain *formulae* occurring at the *commencement* of pleadings *subsequent to the declaration*, and to other *formulae* occurring at the conclusion.

It is in some measure connected with the rule last stated, and is referable to the same object, namely, that of preventing obscurity and confusion in pleading. It is much insisted upon by the older writers, more indiscriminately perhaps than the nature of things warranted. (St. Pl. 394-'4; 3 Th. Co. Lit. 433 & n, (M. 1); 1 Chit. Pl. 493 & seq, 589 & seq; Com. Dig. Pleader, (E. 27), (E. 28), (E. 32), (E. 33), (F. 4), (F. 5), (G. 1); Id. Abatement, (I. 12); 3 Saund. 209 & seq, n (1).)

Pleadings *subsequent to the declaration* then, begin and conclude, for the most part, with characteristic *formulae*, known as their *commencements* and *conclusions*, which are contrived to indicate the nature, object, and scope of the pleadings to which they severally belong. It is evident, therefore, that to observe these *formulae* must contribute not a little to the clearness and perspicuity of the allegations.

The *formula* which occurs at the *conclusion* of a pleading, inasmuch as it prays in behalf of the party who pleads that judgment to which he supposes the averments contained in the pleading entitle him, is generally denominated the *prayer of judgment*.

The subject may be presented under the heads forthcoming, namely: (1), Formal commencements and conclusions of *pleas dilatory*; (2), Formal commencements and conclusions of *pleas peremptory*; (3), Formal commencements and conclusions of *replications*; (4), Formal commencements and conclusions of *pleadings subsequent to the replication*; (5), Variations in respect to formal commencements and conclusions in certain cases; (6), Exception where pleadings tender issue; (7), The legal effect of the commencement and conclusion; and (8), The consequences of defect or mistake in the commencement and conclusion of a pleading.

#### 1<sup>d</sup>. Formal Commencements and Conclusions of *Pleas Dilatory*.

A dilatory plea has, for the most part, *no formal commencement* such as is here intended, unless it be for matter *apparent on the face* of the writ or declaration, when it must begin as well as conclude by *praying judgment, &c.* (St. Pl. 394; 1 Chit. Pl. 494-'5; 3 Saund. 209, n (1), 209 d, n (1).) A formal *conclusion*, however, varying with the nature of the plea, belongs to each class of dilatory pleas; and it is still a matter of great importance that such conclusion should be accurately according to law, for it is said to "*make the plea*," that is, to determine its character. (1 Chit. Pl. 496; 3 Saund. 209, c & d, n (1).) Let us note then the proper conclusion to each one of the classes of dilatory pleas (*Ante*, 625 & seq), namely, (1), Pleas to the jurisdiction of the court; (2), Pleas in suspension of the action; and (3), Pleas in abatement of the writ or declaration; W. C.

#### 1<sup>o</sup>. Formal Conclusion of a *Plea to the Jurisdiction*.

The conclusion of a plea to the jurisdiction (*Ante*, p. 626), is as follows:

Wherefore, the said defendant prays judgment *whether this court can or will take any further cognizance of the action aforesaid*.

#### 2<sup>o</sup>. Formal Conclusion of a *Plea in Suspension*.

The conclusion of a plea in suspension, as because the plaintiff is an *alien enemy* (*Ante*, p. 626-'7; St. Pl. 394; 3 Th. Co. Lit. 389-'90; Trollop's Case, 8 Co. 69 a; 1 Wentw. Pl. 15), is thus:

Wherefore, the said defendant prays that the *said suit may remain and be respited without day, until, &c.*

3°. Formal Conclusion of a *Plea in Abatement*.

A plea in abatement, it will be remembered, proposes to abate or quash the writ, or declaration, or both, either because of, (1), A disability of the party to sue or to be sued; or (2), Some objection to the frame of the writ or declaration, (*Ante*, p. 627); and as the conclusion of the plea, according to some precedents, varies according to the ground on which it is founded, it is expedient to discriminate between the cases just stated;

W. C.

1°. Formal Conclusion of a *Plea in Abatement for the Disability of the Party*.

The conclusion of such a plea in abatement (*Ante*, p. 628), is as follows;

Wherefore, because the said D, (the party's husband), is not named in the said writ and declaration, the said defendant prays judgment *if the said plaintiff ought to be answered* to his said declaration [or of the said writ and declaration, and that the same may be quashed.]

2°. Formal Conclusion of a *Plea in Abatement for the Frame of the Writ or Declaration*.

The conclusion is thus, (*Ante*, p. 629, 632; St. Pl. 395):

The said defendant prays judgment of the said writ and declaration, [or of the declaration] *aforesaid*, and that the same may be quashed.

2°. Formal Commencements and Conclusions of *Pleas Peremptory, or in Bar*.

We must now distinguish between, (1), Formal commencements; and (2), Formal conclusions;

W. C.

1°. Formal *Commencements of Pleas Peremptory*.

A considerable modification having been wrought in the formal commencement of pleas peremptory, or in bar, by the Rules of Court of Hilary Term, 1834, and of our corresponding statute, contained in the revisal of 1849, we must discriminate between the doctrine as to such commencements, (1), At common law; and (2), By statute in Virginia;

W. C.

1°. Formal *Commencements at Common Law of Pleas Peremptory*.

The commencement of pleas in bar consisted at common law, as the student will remember, was formerly explained, (*Ante*, p. 636-'7, 653,) of two parts, the *defence* and the *actionem non*, and ran thus:

The said defendant, by his attorney, comes and [*defends the wrong and injury when and where it behooves him, and the damages, and whatsoever he ought to de-*

*send, and*] says, that the said plaintiff ought not to have or maintain his action aforesaid thereof against him, because he says, &c.

The words within the brackets in italics constituted the *defence*, and the words in Roman letters, the *actionem non*, or the *actio. non*, as it was wont to be styled. Our statute, following the Rules of Court of Hilary Term, 1834, provides that "No formal defence shall be required in a plea; it shall commence as follows: 'the defendant says that,'" (V. C. 1873, c. 167, § 29); thus doing away with *defence* in all cases. And further, it is provided, that "in a plea intended to be pleaded *in bar of the action*, (that is, of the *whole action*,) it shall not be necessary to use any allegation of *actionem non*," (V. C. 1873, c. 167, § 25), whereby the *actio. non* is superseded and dispensed with wherever the plea is in bar of the *whole action*.

## 2<sup>d</sup>. Formal Commencement of Pleas Peremptory by Statute in Virginia.

According to the statutory provisions just mentioned, the plea in bar, when it applies to the *whole action*, commences thus:

The said defendant, by his attorney, comes and says that, &c.

And if the plea be not in bar of the *whole action*, the commencement is as follows, (*Ante*, p. 654; St. Pl. 396):

The said defendant, by his attorney, comes and says, that as to — dollars, part of the sum in the said declaration demanded, the said plaintiff ought not to have or maintain his action aforesaid thereof against him, because he says, &c.

## 2<sup>e</sup>. Formal Conclusions of Pleas Peremptory.

Here again we must distinguish between the conclusion of pleas in bar, as they are at common law, and as they are by the Rules of Court of Hilary Term, 1834, and by the corresponding statute with us;

W. C.

### 1<sup>st</sup>. Formal Conclusion to Pleas Peremptory at Common Law.

The conclusion at common law is thus, (*Ante*, p. 653, 655):

Wherefore the said defendant prays judgment, if the said plaintiff ought to have or maintain his action aforesaid thereof against him.

### 2<sup>d</sup>. Formal Conclusion to Pleas Peremptory by Statute in Virginia.

In Virginia it is provided by statute, taken from the Rules of Court of Hilary Term, 1834, that in a plea in-

tended to be pleaded *in bar of the action*, which is understood to mean *of the whole action*, (St. Pl. 396,) it shall not be necessary to use any prayer of judgment. (V. C. 1873, c. 167, § 25.)

But where the plea is not in bar of *the whole action*, but of a *part of it only*, the common law conclusion, or prayer of judgment, is still to be employed, and runs thus, corresponding, the student will observe, to the *commencement* in like case, as given above, (*Ante*. p. 655):

Wherefore, the said defendant prays judgment, *whether as to the said sum of — dollars, the said plaintiff ought to have or maintain his action aforesaid thereof against him.*

### 3<sup>d</sup>. Formal Commencements and Conclusions of *Replications*.

We must discriminate, as before, between the formal commencements and conclusions of replications to (1), Pleas dilatory; and (2), Pleas peremptory;  
W. C.

#### 1<sup>o</sup>. Formal Commencements and Conclusions of *Replications to Pleas Dilatory*.

The *commencement* of the replication to pleas dilatory varies with the nature and object of the plea; but the *conclusion* always prays judgment *quod recuperet*, with some diversity of phrase, not according to the nature of the plea, but according to the *nature of the action*, as will be presently illustrated. (St. Pl. 105; 1 Chit. Pl. 499; 3 Saund. 211, n (3).)

Let us take the several classes of dilatory pleas in order, and note the *commencements* and *conclusions* of the replication to (1), Pleas to the jurisdiction; (2), Pleas in suspension; and (3), Pleas in abatement.

#### 1<sup>st</sup>. Formal Commencements and Conclusions of the *Replication to a Plea to the Jurisdiction*.

These commencements and conclusions, as they are not within the scope of the Rules of Hilary Term, 1834, so they are unaffected by any statutes in Virginia, but remain as at common law. We are to take notice of (1), The commencements; and (2), The conclusions of replications to pleas to the jurisdiction;

W. C.

#### 1<sup>st</sup>. Formal Commencement of the *Replication to a Plea to the Jurisdiction*.

The *commencement* of the replication to a plea to the jurisdiction is as follows, (St. Pl. 396; 1 Wentw. Pl. 60):

And the said plaintiff says, that *notwithstanding anything by the said defendant above in pleading alleged, this court ought not to be precluded from taking cognisance of the action aforesaid*, because he says, &c.

2<sup>s</sup>. *Formal Conclusion of the Replication to a Plea to the Jurisdiction.*

The conclusion of the replication to a plea to the jurisdiction is, in an action of *debt*, thus, (St. Pl. 105; *Ante*, p. 778-'79; 1 Chit. Pl. 499; 3 Saund. 211, n (3)):

Wherefore, the said plaintiff prays judgment, and that this court may take cognizance of the action aforesaid, and that his debt aforesaid, together with the damages by him sustained by reason of the detention thereof may be adjudged to him.

And so in other actions, as in replications to *pleas in bar*; for the judgment to which the plaintiff is entitled upon *any issue in fact*, whether upon a dilatory or a peremptory plea, is always as above, *quod recuperet*, (1 Chit. Pl. 499; 3 Saund. 211, n (3); Com. Dig. Abatement, (I, 146), (I, 15); *Ante*, p. 778-'9); and Mr. Stephen's contrary assumption, (St. Pl. 397) is believed to be clearly ill-founded. It is indeed contradicted by his own better considered and better sustained previous statement of the law. (St. Pl. 105.)

2<sup>t</sup>. *Formal Commencements and Conclusions of the Replication to a Plea in Suspension;*

W. C.

1<sup>s</sup>. *Formal Commencement of the Replication to a Plea in Suspension.*

The commencement is as follows, (St. Pl. 397; *Ante*, p. 626-'7):

And the said plaintiff says, that notwithstanding anything by the said defendant above in pleading alleged, the action aforesaid ought not to stay or be respited, because, he says, &c.

2<sup>s</sup>. *Formal Conclusion of the Replication to a Plea in Suspension.*

The conclusion is thus, (St. Pl. 307, 105; *Ante*, p. 778-'9; 1 Chit. Pl. 499; 3 Saund. 211, n (3); *supra*, 2<sup>s</sup>):

Wherefore the said plaintiff prays judgment, if the action aforesaid ought to stay or be respited, and that his debt aforesaid, together with the damages by him sustained by reason of the detention thereof, may be adjudged to him.

3<sup>t</sup>. *Formal Commencements and Conclusions of the Replication to a plea in Abatement.*

W. C.

1<sup>s</sup>. *Formal Commencement of the Replication to a Plea in Abatement.*

The terms of the commencement of the replication depend on whether the plea in abatement is, (1), To the disability of the party to sue or be sued; or (2), To the frame of the writ or declaration;

W. C.

1<sup>h</sup>. Formal Commencement of the Replication to a Plea in Abatement, *for the Disability of the party to Sue or to be Sued.*

Where the plea in abatement is founded on the *disability of the party* to sue or to be sued, the commencement of the replication is thus, (St. Pl. 397; 1 Wentw. Pl. 42):-

And the said plaintiff says, *that notwithstanding anything by the said defendant above in pleading alleged, he, the said plaintiff, ought to be answered to his said declaration, because he says, &c.*

2<sup>h</sup>. Formal Commencement of the Replication to a Plea in Abatement to the *Frame of the Writ or Declaration.*

Where the plea in abatement is founded *on the frame of the writ or declaration*, the commencement of the replication is as follows, (St. Pl. 397; *Ante*, p. 1023):

And the said plaintiff says, *that the said declaration, by reason of anything by the said defendant above in pleading alleged, ought not to be quashed, because he says, &c.*

2<sup>e</sup>. Formal Conclusion of the Replication to a Plea in Abatement.

The conclusion of the replication to a plea in abatement must, of course, vary somewhat, according to the character of the plea to which it is a reply. Let us suppose that it is a plea founded on, (1), The disability of the party to sue or be sued; or (2), The frame of the writ or declaration;

W. C.

1<sup>h</sup>. Formal Conclusion of the Replication to a Plea in Abatement, *founded on the Disability of the Party.*

The conclusion in this case is as follows, (St. Pl. 398; Id. 105; 3 Saund. 211, n (3); 1 Chit. Pl. 499; *Ante*, p. 1026-'7):

Wherefore the said plaintiff prays judgment, and that his debt aforesaid, together with the damages by him sustained by reason of the detention thereof, may be adjudged to him.

2<sup>h</sup>. Formal Conclusion of the Replication to a Plea in Abatement, *founded on the Frame of the Writ or Declaration.*

The conclusion of the replication in this case runs thus, (St. Pl. 105, 398; *Supra*, 1<sup>h</sup>):

Wherefore the said plaintiff prays judgment, and that the said declaration may be adjudged good, and that his debt aforesaid, together with the damages by him sustained by reason of the detention thereof, may be adjudged to him.

2<sup>e</sup>. Formal Commencements and Conclusions of Replications to Pleas Peremptory.



Let us take notice of (1), Formal commencements; and (2), Formal conclusions, of replications to pleas in bar;

W. C.

1<sup>st</sup>. Formal Commencements of Replications to Pleas Peremptory, or in Bar.

It will be remembered that in a previous passage, (*Ante*, p. 670 & seq), it was explained that a difference had been made by the Rules of Court of Hilary Term, 1834, and by the corresponding statute in Virginia, in the commencement of a replication to a plea in bar, so that it will be necessary to advert to the commencement of such replication, (1), At common law; and (2), By statute in Virginia;

W. C.

1<sup>st</sup>. Formal Commencement of the Replication to a Plea in Bar, at Common Law.

At common law, the replication to a plea in bar commenced always with an averment that by reason of anything alleged in the plea, he *ought not to be barred—precludi non debet*—from maintaining his action, and this, from the Latin words just quoted, was denominated the *precludi non*. The form of the commencement then, at common law, is as follows, (St. Pl. 398; *Ante*, p. 670):

And the said plaintiff says, that by reason of anything in the said plea alleged, he OUGHT NOT TO BE BARRED from having or maintaining his action aforesaid against the said defendant, because he says, &c.

But as this *formula* was continually recurring wherever the plaintiff proposed in his replication to maintain his *whole action*, it was perceived that, without producing any obscurity or confusion, it might in such a case be omitted, and that its absence would as much denote the plaintiff's design to maintain his whole action as the *formula* itself could. Accordingly, by our statute, derived from the Rules of Court of Hilary Term, 1834, the *precludi non* is allowed to be omitted where the replication maintains the *whole action*.

2<sup>nd</sup>. Formal Commencement of the Replication to a Plea in bar, by statute in Virginia.

The statute referred to in the preceding paragraph, (V. C. 1873, c. 167, § 25), enacts that in a replication intended to be pleaded in maintenance of the action (that is, as is supposed, of the *whole action*), it shall not be necessary to use any allegation of *precludi non*, or to the like effect, or *any prayer of judgment*. In that case, therefore, there would be, under this statute, no formal commencement.

But if the replication be not pleaded in maintenance

of the *whole action*, but of *only a part of it*,—as where the defendant's plea controverts but a part of the action, or where the plaintiff is ready to admit a part of the defendant's plea,—in these instances, the statute does not apply, and the case being left as at common law, the replication retains the *precludi non*, in order to show with certainty how much of the action the plaintiff designs to maintain. The form would be as follows, (*Ante*, p. 670-'71):

And the said plaintiff says, that by reason of anything in the said plea alleged, ~~HE~~ OUGHT NOT TO BE BARRED from having or maintaining his action aforesaid against the said defendant, as to ——— dollars, part of the said sum in the said declaration demanded, because he says, &c.

2<sup>d</sup>. Formal Conclusions of Replications to Pleas Peremptory, or in Bar.

The student can hardly fail to see from what has been said, that here also we must discriminate between the conclusion of a replication to a plea in bar, (1), At common law; and (2), Under our statute in Virginia; W. C.

1<sup>st</sup>. Formal Conclusion of the Replication to a Plea in bar, at Common Law.

The conclusion of the replication to a plea in bar at common law is characterized by *praying judgment*. The formula for it varies in different actions, so that it will be stated in reference to the action of, (1), Debt; (2), Covenant; (3), Trespass; (4), Trespass on the case in *assumpsit*; (5), Trespass on the case in general; W. C.

1<sup>h</sup>. Formal Conclusion of the Replication to a Plea in bar, at common law, in an action of Debt.

In an action of *debt*, the conclusion of the replication to a plea in bar, at common law, is as follows, (St. Pl. 399; *Ante*, p. 1025-'6):

Wherefore, the said plaintiff *prays judgment, and that his debt aforesaid, together with the damages by him sustained, by reason of the detention thereof, may be adjudged to him.*

2<sup>h</sup>. Formal Conclusion of the Replication to a Plea in bar, at common law, in an Action of Covenant.

In an action of *covenant*, the conclusion is as follows, (St. Pl. 399):

f Wherefore the said plaintiff *prays judgment, and that his damages by him sustained, by reason of the said breach of covenant, may be adjudged to him.*

3<sup>h</sup>. Formal Conclusion of the Replication to a Plea in bar, at common law, in an Action of Trespass.

In an action of *trespass*, the conclusion is thus, (St. Pl. 399):

Wherefore, the said plaintiff prays judgment, and that his damages by him sustained by reason of the committing the said trespasses, may be adjudged to him.

4<sup>h</sup>. Formal Conclusion of the Replication to a Plea in bar, at common law, in an *Action of Trespass on the Case in Assumpsit*.

In an action of *trespass on the case in assumpsit* the conclusion is thus, (St. Pl. 399):

Wherefore, the said plaintiff prays judgment, and that his damages by him sustained, by reason of the not performing of the said several promises and undertakings, may be adjudged to him.

5<sup>h</sup>. Formal Conclusion of the Replication to a Plea in bar, at Common Law, in an *Action of Trespass on the Case in General*.

In an action of *trespass on the case in general* the conclusion runs thus, (St. Pl. 299):

Wherefore, the said plaintiff prays judgment, and that his damages by him sustained, by reason of the committing of the said several grievances, may be adjudged to him.

And in all *other actions* the conclusion of the replication, at common law, is with a prayer of judgment for damages, or other appropriate redress, according to the nature of the action. (St. Pl. 399; 3 Chit. Pl. 1145, 1170, 1185, 1189, 1201.)

2<sup>g</sup>. Formal Conclusion of the Replication to a Plea in bar, by *Statute in Virginia*.

The student will recall, that it was shown above (*Supra*, p. 1029), that the statute which dispenses with the *precludi non*, where the replication maintains the *whole action*, enacts, that in such case there need be *no prayer of judgment*. (V. C. 1873, c. 167, § 25.) But as the statute does not dispense with the *precludi non* where the replication maintains only *a part of the action*, so in that case the prayer of judgment must be used as at common law. The *formula*, in an action of debt, is as follows:

Wherefore, as to the said sum of — — dollars [or whatever is the part of the action the replication is designed to maintain], the said plaintiff prays judgment, and that the sum last aforesaid, part of his debt aforesaid, together with his damages by him sustained, by reason of the detention thereof, may be adjudged to him.

And so in other actions, according to the nature of the action. (*Supra*, p. 1029.)

4<sup>d</sup>. Formal Commencements and Conclusions of *Pleadings Subsequent to the Replication*; W. C.

1°. Formal Commencements and Conclusions of Pleadings Subsequent to the Replication *on the Part of the Defendant*.

It must suffice to say, in general, that pleadings subsequent to the replication, *on the part of the defendant*, commence and conclude like the *plea*; and like the *plea*, are subject to the effect of the statute above cited. (St. Pl. 400; V. C. 1873, c. 167, § 25.)

2°. Formal Commencements and Conclusions of Pleadings Subsequent to the Replication *on the Part of the Plaintiff*.

The pleadings subsequent to the replication, *on the part of the plaintiff*, commence and conclude like the replication; and like the replication, are subject to the effect of the statute so often cited, which provides that "In a plea, replication, or subsequent pleading, intended to be pleaded in bar, or in maintenance of the action, it shall not be necessary to use any allegation of "*actionem non*," or "*precludi non*," or to the like effect, or any prayer of judgment. (V. C. 1873, c. 167, § 25; St. Pl. 400.)

5<sup>d</sup>. Variations in Respect to Formal Commencements and Conclusions in Certain Cases.

The exposition of the variations in respect to formal commencements and conclusions in certain cases, may best be made by classifying them under the several heads of variations in case of (1), Pleas in abatement; (2), Pleas in bar; (3), Pleadings by way of estoppel; (4), Pleadings which are intended to apply to *part only* of the matter adversely alleged; (5), Pleadings in the action of replevin; and (6), Action of debt on a bond, where the matter pleaded tends to show that the plaintiff *never had* any right of action; W. C.

1°. Variations as to Formal Commencements and Conclusions in Case of Pleas in Abatement.

Matters of abatement, in general, only render the action *abatable* upon plea; but there are other matters, such as the death of the plaintiff or defendant before verdict or judgment by default, that are said to abate it *de facto*; that is, by their own immediate effect and before plea; the only use of the plea in such cases being to give the court notice of the fact. St. Pl. 400; Com. Dig. Abatement, (E. 17), (H. 32) to (H. 35); Bac. Abr. Abatement, (K), (G), (F); 3 Saund. 209 e, n (1).)

Where the action is merely *abatable*, the forms of conclusion above given are to be observed; but when abated *de facto*, the conclusion should be thus, (St. Pl. 401; 3 Saund. 209 e, n (1); Hollowes v. Lucy, 3 Lev. 120):

Wherefore the said defendant prays judgment of the writ and declaration [or of the declaration] aforesaid, whether the court will further proceed with the said action.

For the writ and declaration, or the declaration, being already and *ipso facto* abated, it would be incongruous, and therefore improper to pray that it *might be quashed*. (Com. Dig. Abatement, (H. 33), (I. 12); 3 Saund. 209 e, n (1).)

It may be expedient to observe here, that although at common law, where there were several parties, plaintiff or defendant, to an action, and one of them died, the action abated, yet it is provided in Virginia by statute, taken from 8 and 9 Wm. III, c. 11, that where the cause of abatement occurs to any of several plaintiffs or defendants, the suit may proceed for or against the others, if the cause of action survive to or against them, (2 Saund. 209 e, n (1) & (i); V. C. 1873, c. 169, § 2); and by act of January 6, 1876, it is enacted that the suit shall be revived against the personal representative of a deceased *joint defendant*, and shall proceed thenceforward as a *separate action* against such personal representative, as though the decedent had been a *sole defendant*. (Acts 1875-'6, p. 11, c. 12.)

2°. Variations as to Formal Commencements and Conclusions in case of *Pleas in Bar*.

When a plea in bar is pleaded of matter which arose *after a previous plea*, it has a peculiar *commencement* and *conclusion* of *actio. non ulterius*. Thus, if in an action of debt on a bond payment be pleaded, and *afterwards* a release of the bond be executed by the plaintiff, the plea would commence thus, (St. Pl. 65, 401):

And the said defendant says, that the said plaintiff ought not farther to have or maintain his action aforesaid against him, because he says, &c.

And would conclude thus:

Wherefore the said defendant prays judgment, if the said plaintiff ought farther to have or maintain his action aforesaid against him, &c.

So if a plea in bar be founded on any matter arising *after the commencement of the action*, though it be not pleaded *after a previous plea*, it has the same *commencement* and *conclusion* of *actionem non ulterius* as above, and *actionem non* merely would be improper; for that *formula* is taken to refer, in point of time, to the commencement of the suit, and not to the time of plea pleaded. (St. Pl. 401; 3 Chit. Pl. 906; Evans v. Prosser, 3 T. R. 188; Le Bret v. Papillon, 4 East. 502; Smith v. Walker, 1 Wash. 135.)

3°. Variations as to Formal Commencements and Conclusions in Case of *Pleadings by way of Estoppel*.

All pleadings by way of *estoppel* have a *commencement* and *conclusion* peculiar to themselves. It will be desirable

to point out the peculiarities in respect to, (1), *Pleas* by way of estoppel; (2), *Replications* by way of estoppel; and (3), *Rejoinders and subsequent pleadings* by way of estoppel;  
W. C.

1<sup>f</sup>. Formal Commencements and Conclusions of *Pleas* by way of *Estoppel*; W. C.

1<sup>s</sup>. Formal Commencement of a *Plea* by way of *Estoppel*.  
A *plea* in estoppel has the following *Commencement*, (St. Pl. 401-'2):

And the said defendant says that the said plaintiff ought not to be admitted to say, [stating the allegation to which the estoppel relates.]

2<sup>s</sup>. Formal Conclusion of a *Plea* by way of *Estoppel*.

The conclusion of a plea by way of estoppel is thus, (St. Pl. 402):

Wherefore the said defendant prays judgment, if the said plaintiff ought to be admitted against his own acknowledgment, by his deed aforesaid (or otherwise, according to the matter of the estoppel), to say that, [stating the allegation to which the estoppel relates.]

2<sup>f</sup>. Formal Commencements and Conclusions of *Replications* by way of *Estoppel*; W. C.

1<sup>s</sup>. Formal Commencement of a *Replication* by way of *Estoppel*.

A replication by way of estoppel to a plea either dilatory or in bar, has this commencement, (St. Pl. 402; 3 Chit. Pl. 1143, 1144):

And the said plaintiff says that the said defendant ought not to be admitted to plead the said plea by him above pleaded; because he says, &c.

2<sup>s</sup>. Formal Conclusion of a *Replication* by way of *Estoppel*.

The conclusion of a replication by way of estoppel is as follows, (St. Pl. 402; 3 Chit. Pl. 1143, 1144; Took v. Glascock, 1 Saund. 259):

Wherefore, the said plaintiff prays judgment, if the said defendant ought to be admitted to his said plea, contrary to his own acknowledgment, &c., and (in an action of debt) that his debt aforesaid, together with his damages by him sustained, by reason of the detention thereof may be adjudged to him.

3<sup>f</sup>. Formal Commencements and Conclusions of *Rejoinders* and *Subsequent Pleadings* by way of *Estoppel*.

It will suffice to say that in *rejoinders*, and other pleadings of defendant, by way of *estoppel*, the commencement and conclusion are assimilated to *pleas*; and in *sur-rejoinders*, and other pleadings of plaintiff, the commencement and conclusion are assimilated to *replications*. (St. Pl. 402; Veale v. Warner, 1 Saund. 325, 325 a, n (4).)

4<sup>e</sup>. Variations as to Formal Commencements and Conclusions in Case of Pleadings which are designed to apply to Part only of the Matter adversely Alleged.

If any pleading be intended to apply to *part only* of the matter adversely alleged, it must be qualified accordingly in its *commencement* and *conclusion*. But of this principle sufficient illustration has been already presented. (*Ante*, p. 654-'5, 1025; St. Pl. 402-'3.)

5°. Variations as to Formal Commencements and Conclusions in the Action of Replevin.

The student will doubtless remember that the action of replevin is unfortunately abolished with us, (V. C. 1873, c. 145, § 4; *Ante*, p. 445-'6); but as it is still in vigorous and frequent use in other States, it will be proper to say under this head, that when the defendant alleges, in answer to the complaint in the declaration, of the unlawful taking, that he had a right to take the chattel in question, for rent in arrear, or other legal cause, he is said to *avow*, and his plea is styled an *avowry*. If on the other hand, he claims in his answer to the declaration, no personal right in himself, but only as *bailiff or agent* for another, he is said to *make cognizance*, and his plea is styled a *cognizance*. What, therefore, in other actions are *pleas*, in replevin are denominated *avowries* and *cognizances*. The commencement of an *avowry* is that the defendant "*well avows*," whilst that of a *cognizance* states that the defendant "*well acknowledges*" the taking, &c.; the *conclusion* of both being, "that the defendant *prays judgment, and that a return of the said goods and chattels, together with his damages, &c., be adjudged to him.*" And the subsequent pleadings have correspondent variations. (St. Pl. 403; 8 Wentw. Pl. 106, 197, 109, 112 & seq.)

6°. Variation in an Action of Debt on a Bond, where the Matter Pleaded tends to show that the Plaintiff *never had any Right of Action*.

The case supposed is that in an action of debt on a bond, the plea alleges that some illegality of consideration, or in the making, taints the obligation, and makes it voidable or void; as usury, gaming, or any other transaction prohibited by, or contrary to the policy of a statute; and the principle of pleading above stated requires that in such cases the plea should commence and conclude with what is called an *onerari non*. (St. Pl. (Tyler,) 350; Com. Dig. Pleader, (E. 27); Brown v. Corrish, 2 Salk. 516; S. C., 1 Ld. Raym. 217; Bennet v. Filkins, 1 Saund. 14 b, 15; Id. 290, n (3);

W. C.

1°. Formal Commencement.

The formal commencement in such a case, (supposing the action to be *debt*) is:

And the said defendant says, that he ought not to be charged (*onerari non*) with he said debt by virtue of the said supposed writing obligatory, because, &c.

2<sup>d</sup>. Formal Conclusion.

And the conclusion, still supposing the action to be *debt*, is :

Wherefore, the said defendant prays judgment if he ought to be charged with the said debt, by virtue of the said supposed writing obligatory.

6<sup>d</sup>. Exceptions where *Pleadings tender Issue*.

Pleadings which tender issue do not in their *commencement* differ from other pleadings ; but in their *conclusion*, instead of a *prayer of judgment*, they conclude (in the case of trial by jury) *to the country* ; or, if a different mode of trial be proposed, with other appropriate *formulae*, as explained *Ante*, p. 922, & seq. It will be remembered, however, that where they are pleaded *in bar*, or *in maintenance of the whole action*, the statute (V. C. 1873, c. 167, § 25), dispenses with the *formula* of commencement altogether, and in all cases. (St. Pl. 403-'4.)

7<sup>d</sup>. The legal Effect of the Formal Commencements and Conclusions.

The student will observe, that the commencement and conclusion of a *plea* are such as to *indicate the view* with which it is pleaded, and to mark its object and tendencies, as being either *to the jurisdiction, in suspension, in abatement, or in bar*. It is, therefore, held that the class and character of a plea depends upon these its formular parts ; which is ordinarily expressed by the maxim *conclusio placitum facit*. Accordingly, if it commence and conclude *as in bar*, but contain matter *in abatement only*, it is a bad plea in bar, and no plea in abatement. And on the other hand, it is held, that if a plea commence and conclude *as in abatement*, and show matter *in bar*, it is a plea in abatement, and not in bar. (St. Pl. 405 ; 2 Saund. 209 d, n (1) ; Street v Hopkinson, Rep. Temp. Hardw. 346 ; Medina v. Stoughton, 1 Ld. Raym. 593 ; Nowlan v. Geddes, 1 East. 634 ; Godson v. Good, 6 Taunt. 587.)

As the *commencement* and *conclusion* have this effect of *defining the character of the plea*, so they have the same tendency in the *replication and subsequent pleadings*. Thus they serve to show whether the pleading be intended as in confession and avoidance, or in estoppel, &c ; and whether intended to be pleaded to the whole of the action, or of the adversary pleading, or to part only. From these considerations, it is apparent that they are forms which, on the whole, materially tend to clearness and precision in pleading ; and for that reason they have been arranged under this section. (St. Pl. 406.)

Nor has the statute dispensing with the usual commencements and conclusions, where the pleading is *in bar*, or *in*



*maintenance* of the *whole action*, lost sight, in its pursuit of conciseness, of the advantages resulting from these forms; for the *absence* of the commencement and conclusion as decisively proclaim the intended character of the pleading as the appropriate commencement and conclusion would do. (St. Pl. 406.)

8<sup>d</sup>. The Consequence of a *Defect or Impropriety in the Commencement and Conclusion of a Pleading*.

Any defect or impropriety in the *commencement* or *conclusion* of a pleading is, in general, ground for demurrer; but it is believed of *special demurrer* only; so that in Virginia such defect or impropriety cannot be taken advantage of at all, except as to *dilatory pleas*, which are looked upon with no favor, and in which, in order to discourage their use, the utmost strictness is required. (St. Pl. 404; Cecil v. Early, 10 Grat. 198.)

9<sup>o</sup>. RULE IX. A PLEADING WHICH IS BAD IN PART, IS BAD ALTOGETHER.

The meaning of this rule is, that if in any material part of a pleading, or in reference to any of the material things which it undertakes to answer, or to either of the parties answering, the pleading be bad, though in other respects it be free from objection, the whole of it is open to demurrer, and judgment must be given accordingly. (St Pl. 407; Com. Dig. Pleader, (E. 36), (F. 25); Earl of Manchester v. Vale, 1 Saund. 28, & n (2); Webber v. Tivill, 2 Saund. 127 a, b. c.)

Thus, if in trespass for breaking and entering the plaintiff's close, and with cattle eating up his grass, the defendant pleads a justification, which is good as to breaking and entering the close, but is bad as to the trespass with the cattle, the plea is bad *for the whole*. (Earl of Manchester v. Vale, 1 Saund. 27.)

And if, in a declaration in assumpsit, two different promises be alleged in two different counts, and the defendant plead a single plea in bar to both counts, namely, of the statute of limitations, that the cause of action did not accrue within the time prescribed, and the plea is a good bar as to one count, but not sufficient, because not applicable, as to the other, the *whole plea is bad*, and neither count is sufficiently answered. (Webb v. Martin, 1 Lev. 48.)

So, where to an action of trespass for false imprisonment, against two defendants, they pleaded a *joint plea*, that one of them, A, having ground to believe that his horse had been stolen by the plaintiff, gave him in charge to the other defendant, a *constable*, and that A, in his aid and by his command, laid hands on the plaintiff, &c., the plea was adjudged to be bad as to both defendants, because it showed no reason-

able ground of suspicion; for A could not justify the arrest without showing such ground; and though the case might be different as to the constable, whose duty it was to act on the charge, and not to deliberate, yet as he had not pleaded separately, but had joined in A's justification, the plea was bad as to him also. (*Hedges v. Chapman*, 2 Bingh. (9 E. C. L.) 523.)

This rule results from that which requires each pleading to have its *proper formal commencement and conclusion*. For by those forms it is ascertained whether the matter contained in any pleading is offered as an entire answer to the whole, or to some definite part of what has been adversely alleged; and if, therefore, the pleading purport, from the commencement and conclusion, to answer the whole of the opposing allegation, whether by an appropriate commencement and conclusion, as at common law, or by the omission of both under the statute, and then in fact answers validly *but a part*, it is fatal on demurrer for want of a proper commencement and conclusion. (St. Pl. 408.)

In the second case above stated, it will be observed, that the pleader's mistake consisted in pleading one plea to both counts. Had he pleaded the statute of limitations separately to each count, with a separate commencement and conclusion to each plea, the invalidity of one plea would not have vitiated the other. (St. Pl. 409.)

As the *declaration* contains no commencement or conclusion of the kind to which the rule preceding the present relates, so, as might be expected from that circumstance, the declaration does not fall within the rule now under discussion. Therefore, if a declaration be good in part, though bad as to another part relating to a *distinct demand divisible from the rest*, whether in several counts or a single count, and the defendant demur *to the whole* instead of confining his demurrer to the faulty part only, the court will give judgment for the plaintiff. (St. Pl. 409; *Ante*, p. 1099; 1 Saund. 286, n (9); Bac. Abr. Pleas. &c. (B.) 16; Com. Dig. Pleader, (Q. 3); *Henderson v. Stringer*, 6 Grat. 134; *Wright v. Michie*, 6 Grat. 354; *Smith v. Lloyd*, 16 Grat. 309 & seq.) But if a declaration be founded on one *indivisible demand*, as on a *single* promise, or the conversion of a *single* chattel, and is ill in part, it is necessarily so *in toto*. (Gould's Pl. c. IV, § 49, n (4).)

It is also to be observed, that the rule applies only to *material allegations*; for where the objectionable matter is mere surplusage, and unnecessarily introduced, its introduction does not vitiate the rest of the pleading. (St. Pl. 409-'10; *Duffield v. Scott*, 3 T. R. 377.)

## SECTION VI.

*Of Rules which tend to prevent Prolivity and Delay in Pleading.*6<sup>b</sup>. Rules which tend to prevent Prolivity and Delay in Pleading.

The rules which tend to prevent prolivity and delay in pleading may be thus enumerated and classified, namely: (1), There must be no departure in pleading; (2), Where a plea amounts to the general issue it should be so pleaded; and (3), Surplusage is to be avoided;

W. C.

1<sup>a</sup>. RULE I. THERE MUST BE NO DEPARTURE IN PLEADING.

A *departure* takes place when, in any pleading, the party deserts the ground that he took in his last antecedent pleading, and resorts to another, a practice which, in conversational discussion often protracts the debate indefinitely, and leaves the disputants "in wandering mazes lost." It is no wonder, therefore, that in forensic altercation it should be rigorously inhibited. "Each party," says Lord Coke, "must take heed of the ordering of the matter of his pleading, lest his replication *depart* from his count, or his rejoinder from his bar; *et sic de cæteris*." (3 Th. Co. Lit. 435 & seq; St. Pl. 410 & seq; Com. Dig. (F. 7) to (F. 11); Bac. Abr. Pleas, &c., (L).)

It is hardly necessary to remark that no departure can ever occur till the replication. But it may be either, (1), In point of *fact*; or (2), In point of law; and we must furthermore observe, (3), Certain examples of cases which have been held not to be departures; and (4), The foundation of the rule against departure;

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1<sup>d</sup>. There must be no *Departure in point of Fact*.

The departure in point of fact may occur in (1), The replication; and more frequently in (2), The rejoinder, or subsequent pleadings;

1<sup>e</sup>. Examples of *Departure in the Replication*.

The following examples may be stated by way of illustration:

(1), *Declaration*. By executor, on a promise alleged to be made to the testator.

*Plea*. The statute of limitations.

*Replication*. A new promise made to the executor. (Hickman v. Walker, Willes 29, 30.)

(2), *Declaration* on a bond with collateral condition by R. G. & G. L. against C. G. & A. S.

*Plea*. Conditions performed.

*Replication*, purporting to be by R. G. against C. G. and A. S. (Graham v. Graham, 4 Munf. 206-37.)

2<sup>e</sup>. Examples of *Departure in the Rejoinder, &c.*

Instances of a departure in the rejoinder happen more frequently than in the replication, and will be illustrated by the examples following:

(1), *Declaration*, in debt on bond conditioned *to perform an award*.

*Plea*. No award made.

*Replication*. Award made in proper time.

*Rejoinder*. Award not tendered in due time. (Roberts vs. Mariett, 3 Saund 168.)

(2), *Declaration*, in debt on a bond conditioned *to keep the plaintiffs harmless and indemnified* from all suits, &c. of one Cook.

*Plea*. Defendants have kept the plaintiffs harmless, &c.

*Replication*. Cook sued plaintiffs, and so defendant had not kept them harmless.

*Rejoinder*. Defendants had no notice of the damnification. (Cutler v. Southern, 1 Saund. 116.)

(3), *Declaration*, in debt on a bond conditioned *to perform the covenants in a lease*, one of which was that the lessee, at every felling of wood would make a fence.

*Plea*. Defendant had not felled any wood.

*Replication*. Defendant felled two acres of wood, but made no fence.

*Rejoinder*. Defendant did make a fence. (Anon. 3 Dyer, 253 b.)

2<sup>d</sup>. There must be *no Departure in Point of Law*.

If the party put the same facts on a new ground, in *point of law*, it is a departure. Thus, if the plaintiff in his declaration claim an estate by the *common law*, and maintains it in his replication under the *statute of uses*, it is a departure. And so it is if, in the declaration, the plaintiff entitle himself *by feoffment*, and in his replication maintain it by a *lease and release*. (Com. Dig. Pleader, (F. 8), (F. 10); 3 Th. Co. Lit. 437.) So also, if to an action for the price of goods, defendant pleads that they were exported from the United States to Canada *during the war with England*, and there sold to defendant; and plaintiff replies that they were exported before the war; to which the defendant rejoins that they were exported *in violation of the embargo law*; it was held to be a departure. (Sterns v. Patterson, 14 Johns. (N. Y.), 132.)

3<sup>d</sup>. Examples of Cases which have been *Held to be no Departures*.

Very numerous examples present themselves of cases which the courts have held to *be no departure*. (Com. Dig. Pleader, (F. 11); Beach v. Trudgain, 2 Grat. 219.) Thus:

(1), *Declaration*, in debt on a bond conditioned to perform

covenants, one of which was that defendant *should account for all monies received*.

*Plea*. Conditions performed.

*Replication*. A named sum came to his hands for which he had not accounted.

*Rejoinder*. Defendant *did account thus*: that he was *robbed of it* by violence.

The court held that showing he was robbed *was giving an account*, and so there was no departure. (St. Pl. 415; Vere v. Smith, 2 Lev. 5.)

(2), *Declaration*, in debt on a bond conditioned to indemnify the plaintiff *from certain charges* due to W. B.

*Plea*. Non damnificatus.

*Replication*. For a named sum of *charges due to W. B.*, plaintiff's property was distrained.

*Rejoinder*. No charges *were due to W. B.* (St. Pl. 415-16; Bac. Abr. Pleas, &c. (L).)

(3), *Declaration*, in debt on a bond conditioned for the performance of an award.

*Plea*. Arbitrators *made no award*.

*Replication*. Award duly made, and part of it set forth.

*Rejoinder*. Whole award set forth, showing that *it was a bad award*. (St. Pl. 416-17; Fisher v. Prinbley, 11 East. 188.)

(4), Wherever the variance between the former and the latter pleading is *on a point not material*, there is no departure. Thus,

*Declaration*, in assumpsit, states a promise *made ten years ago*.

*Plea*. Defendant did not promise *within five years*.

*Replication*. Defendant *did promise within five years*.

This is no departure, because the time laid in the declaration is immaterial. (St. Pl. 417.)

#### 4<sup>d</sup>. The Foundation of the *Rule against Departure*.

The rule against departure is evidently necessary, as has been previously shown, to prevent the retardation of the issue. (St. Pl. 418; *Ante*, p. 1039; 2 Saund. 84 a, n (1).)

The only mode of taking advantage of a departure is by demurrer, and not by motion in arrest of judgment; and according to some authorities it must be a *special demurrer*. (Com. Dig. Pleader, (F. 10); 1 Saund. 117.) But in the United States, the better opinion is believed to be that the error is fatal on *general demurrer*. (Sterns v. Patterson, 14 Johns. (N. Y.) 132; Spencer v. Southwick, 10 Johns. 259; Andrus v. Waring, 20 Johns. 160; Keay v. Goodwin, 16 Mass. 1.)

2<sup>c</sup>. RULE II. WHERE A PLEA AMOUNTS TO THE GENERAL ISSUE IT SHOULD BE SO PLEADED.

Lord Coke states the rule emphatically thus: "Pleadings which amount to the general issue are not to be allowed; but the general issue is to be entered," and so are all the authorities. (St. Pl. 418-'19; 3 Th. Co. Lit. 408, & n (B. 1); Com. Dig. Pleader, (E. 14); Bac. Abr. Pleas, &c. (G. 3); 1 Chit. Pl. 567 & seq.)

It will be remembered that it was formerly explained, that in most actions there is an appropriate form of plea, called the *general issue*, fixed by ancient usage as the proper method of traversing the declaration when the pleader means to deny the whole, or the principal part of its allegations. (*Ante*, p. 640 & seq, 899 & seq.) And the intent of the present rule is to require, that if the matter of the defence be constructively and in effect the same as the general issue, it shall be pleaded in that form, and not in a more special way. (St. Pl. 419.) And what does thus in effect amount to the general issue is determined by this general principle, namely, that any matter of defence which denies what, on the general issue, the plaintiff would be obliged to prove, is of that character; and if pleaded specially, the plea is bad on *special demurrer*. On the other hand, any ground of defence which admits the facts alleged in the declaration, but avoids the action by matter which the plaintiff, upon the general issue, would not be bound to prove, or to dispute in the first instance, may be pleaded specially, of which several examples will be presently exhibited.

Let us advert to, (1), Instances of the application of the rule, and of the exceptions thereto; (2), The reason or principle of the rule; and (3), The mode of taking advantage of a violation of the rule;

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1<sup>d</sup>. Instances of the Application of the Rule, and of the Exceptions thereto.

These instances abound even in the year-books, as well as since. Thus, in the cases following:

(1), *Declaration*, in trespass, for entering the plaintiff's garden.

*Plea*. The plaintiff *had no such garden*.

This was held to be "no plea; for it amounts to nothing more than *not guilty*; for if the plaintiff had no such garden then the defendant is not guilty;" and upon the general issue, the plaintiff would be obliged to prove that he had such a garden. (St. Pl. 419; 10 Hen. VI, 16.)

(2), *Declaration*, in trespass, for depasturing the plaintiff's herbage.

*Plea.* Defendant *non depascit herbas*, did not depasture the herbage.

This is no plea. It should be *not guilty*. The plaintiff upon the general issue, must prove the depasturing. (St. Pl. 419; 22 Hen. VI, 37.)

(3), *Declaration*, in debt for the price of a horse sold.

*Plea.* Defendant *did not buy the horse*.

This is no plea. It amounts to *nil debet*. The plaintiff upon the general issue would have to prove the purchase. (St. Pl. 419; 22 Edw. IV, 29.)

(4), *Declaration*, in debt on a Bond.

*Plea.* Defendant executed the bond; but *executed it not to the plaintiff, but to another person*.

This is bad, as amounting to *non est factum*. Upon the general issue, the plaintiff would have to prove that the bond was executed to him. (St. Pl. 417.)

(5), *Declaration*, in assumpsit by a Bank, on a promissory note.

*Plea.* *No such corporation*.

This is bad, as amounting to *non assumpsit*; for on that general issue the bank must at common law *prove its incorporation*. (Bank of Auburn v. Meed, 19 Johns. (N. Y.), 302; Grays v. T. Pike Co. 4 Rand. 579.)

(6), *Declaration*, in assumpsit, on a joint promissory note against two defendants.

*Plea.* It was the *separate note of the co-defendant*.

This plea amounts to the general issue, and is, therefore, bad; for upon the general issue the plaintiff cannot recover without proving that it was *the note of both the defendants*. (Van Ness v. Forest, 8 Cr. 35.) And although by statute in Virginia, as we have seen, a plaintiff who has alleged that an association *is incorporated* is not bound to prove the fact of incorporation, unless the fact be denied by an affidavit filed with the plea which *puts it in issue*, (V. C. 1873, c. 167, § 40), yet the doctrine in question is probably not affected thereby, the way to *put the fact of incorporation in issue* being still by the *general issue*, and not by a special plea of *no such corporation*.

(7), *Declaration*, in trespass on the case *in trover* for the value of goods.

*Plea.* The goods were sold pursuant to plaintiff's order.

This plea was considered to amount to the general issue, and, therefore, was held bad on *special demurrer*. (Kennedy v. Strong, 10 Johns. (N. Y.) 289.)

Yet there are some defences of an exceptional character, which may either be proved under the general issue, (by the relaxed practice explained *Ante*, p. 644-'5), or may be pleaded specially; such, in an action of *assumpsit*, as *duress*,

*infancy, coverture, accord and satisfaction, &c.* Such defences are admissible under the *general issue*, by an unhappy relaxation of principle, as formerly explained. (*Ante*, p. 644-5.) And they may be pleaded specially, because in their nature they admit the plaintiff's allegations, and avoid them, and embrace matters which, upon the general issue properly construed, the plaintiff *need not prove or repel*.

2<sup>d</sup>. The Reason or Principle of the Rule.

Two reasons are commonly assigned in order to justify the rule, of which the first *always*, and the second *sometimes*, applies. Those reasons are that, (1), The rule shortens the altercation, and *tends to prevent prolixity*; and (2), A special plea taken as a *traverse* would be generally *argumentative*; or, if taken as intended by way of *confession and avoidance*, it will sometimes *want color*.

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1<sup>c</sup>. The Rule *Shortens the Altercation*, and *tends to Prevent Prolixity*.

This reason for the rule in question, namely, that it *shortens the altercation*, and *tends to prevent prolixity*, made so strong an impression upon Lord Hobart, that he does not hesitate to say that "the reason of pressing a general issue is not for *insufficiency of the plea*, but not to *make long records* where there is no cause, which is matter of discretion, and therefore *it is to be moved to the court, and not to be demurred upon*." (*Warner v. Wainsford*, Heb. 127.) And this observation may account in part, at least, as is remarked by Mr. Metcalf, in his Notes to Yelverton's Reports, for the occurrence in the books in former times, of numerous special pleas in *trover*, amounting to the general issue, being such as in the *discretion* of the court would be thought not to lead to *too much prolixity*. (*St. Pl. 2nd App'x*, n (14), p. cxxxvi; *Ward v. Blunt*, 1 Cro. (Eliz.) 147; *Kenicat v. Boyan*, Yelv. 198; *Webb v. Fox*, 7 T. R. 391; Yelv. 174 a, n (1).) At a more recent period, however, the employment of special pleas which amount to the general issue has been discountenanced, as leading to needless expense and troublesome prolixity. (*Kennedy v. Strong*, 10 Johns. 291.) But still, as was mentioned above, the defendant *may* plead specially various defences, which admit that the plaintiff had once a cause of action, and go to discharge it, whilst by the relaxed practice attending the general issue in *actions on the case*, those defences may also be proved under the general issue. Thus release, accord and satisfaction, arbitrament and award, former recovery for the same cause, and perhaps some others, may be proved under the general issue, or pleaded



specially, at the party's option. (Yelv. 174 a, b, n (1); 1 Tidd's Pract. 649.)

- 2<sup>c</sup>. A Special Plea taken *as a Traverse* would be generally *Argumentative*; or if taken *by way of Confession and Avoidance* it would *sometimes want color*.

This will appear by one or more examples :

- (1), *Declaration, in trespass, for entering plaintiff's garden. Plea. The plaintiff had no such garden.*

No doubt this plea, which is in substance a *traverse*, is an unanswerable *argument* to show that the defendant did not commit the wrong imputed to him; but it is plainly only an argument, and no *argumentative* pleading is admissible. (St. Pl. 419-'20; *Ante*, p. 1015 & seq.)

- (2), *Declaration, in trespass, for entering plaintiff's garden. Plea. The garden belonged to the defendant.*

Here the plea is *by way of confession and avoidance*; but it gives the plaintiff *no color* to maintain his action, and for that reason is objectionable. (St. Pl. 420; *Ante*, p. 650 & seq.)

- 3<sup>d</sup>. The Mode of taking Advantage of a Violation of the Rule.

We have seen that it was the expressed opinion of Lord Hobart, that the objection that a matter amounting to the general issue was pleaded specially, was not to be taken by demurrer, but was to be addressed to the discretion of the court, (*Warner v. Wainsford*, Hob. 127), which would allow the special plea, or not, according as it was likely to lead to prolixity or otherwise, or was of a character to "breed a scruple in the *lay gents*," that is, to perplex a jury, if it were presented under the general issue. Many authorities, however, hold that the objection is to be taken by demurrer, that is, by *special demurrer*, and it is certain that in many instances it has been taken each way. (Gould's Pl. c. vi, § 85 & seq; Com. Dig. Pleader, (E. 14); Bac. Abr. Pleas, &c. (G.) 3; *Id.* Trespass, (L.) 2; *Leyfield's Case*, 10 Co. 95 a; *Lynner v. Wood*, 4 Cro. (Cr.) 157.) Judge Gould conceives that the conflict may be reconciled by supposing that the proper mode of objecting to such a plea is *by motion*; but that where a demurrer may have been resorted to instead of a motion to reject, and the defendant has joined in it, the error was considered as thereby waived, and judgment would be pronounced upon the demurrer. (Gould's Pl. c. vi, § 88.)

If the objection is to be taken by special demurrer only, it is unavailable in Virginia. (V. C. 1873, c. 167, § 32.) But if it may be made by motion addressed to the discretion of the court, there seems to be no reason why it may not prevail with us.

- 1<sup>c</sup>. RULE III. SURPLUSAGE IS TO BE AVOIDED.

*Surplusage* is here taken in its large sense, as including

*unnecessary matter* of whatever description. To combine with the requisite certainty and precision the greatest possible *brevity* is now justly considered as the perfection of pleading. The student will remember, that Lord Hale characterized pleading as in its nature and origin demanding such brevity and the greatest simplicity of statement, whilst he lamented that it had degenerated from its primitive use and end, and had become too much a matter of needless subtlety. (*Ante*, p. 563.) It is a subject of hearty congratulation that the wisdom of modern judges, aided by judicious legislation, has gone so far to divest the system of the poor niceties with which it had been encumbered. (St. Pl. 422 ; V. C. 1873, c. 167, § 8 to 12, 14, 18 & seq.)

We are to take account of the rule against surplusage in several aspects, as, (1), Prescribing the omission of matter *wholly foreign* ; (2), Prescribing the omission of matter which, though not wholly foreign, *does not require to be stated* ; (3), Prescribing the cultivation of *brevity of statement* ; (4), The danger arising from surplusage ; and (5), The mode of objecting to it ;  
W. C.

1<sup>d</sup>. The Rule against Surplusage prescribes the *Omission of Matter wholly Foreign*.

An example of the violation of the rule against surplusage in this sense occurs when a plaintiff, suing a defendant upon one of the covenants in a long deed, sets out in his declaration, not only the covenant on which he sues, but all the other covenants, though relating to matters wholly irrelevant to the cause. (St. Pl. 423 ; Dundass v. Lord Weymouth, Cowp. 665 ; Price v. Fletcher, Id. 727 ; Phillips v. Fielding, 2 H. Bl. 131.) In Dundass v. Lord Weymouth, just cited, Lord Mansfield, animadverted with great severity upon the usage of stuffing a declaration with such irrelevant matter, and the whole court was of opinion that it would have been in that case sufficient for the plaintiff to set out in his declaration, that the defendant by indenture had demised certain premises therein mentioned, without describing them particularly, subject amongst other things, to such a *proviso*, setting out the substance of the covenant and the breach. And Mr. Wallace, and others conversant with special pleading, said that it was not only unnecessary to state such foreign matter, but very dangerous, by making the pleading liable to variances and formal objections.

2<sup>d</sup>. The Rule against Surplusage prescribes the *Omission of Matter which, though not wholly foreign, yet does not require to be Stated*.

Any matters will fall within this description which, under the various rules enumerated in a former section, as tend-

ing to limit or qualify the degree of certainty, it is unnecessary to allege; (*Ante*, p. 982, & seq); for example, matter of *mere evidence*; matter of *law*, or other things which the court officially notices; matter coming more properly from the other side; matter necessarily implied, &c. (St. Pl. 423.)

3<sup>d</sup>. The Rule against Surplusage prescribes generally, *the Cultivation of Brevity*, and the *Avoidance of Prolixity of Statement*

"A terse style of allegation," says Mr. Stephen, "involving a strict retrenchment of unnecessary words," (and the same observation is applicable to unnecessary averments,) "is the aim of the best practitioners in pleading; and is considered as indicative of a good school" in the art. (St. Pl. 424.)

4<sup>d</sup>. The Danger arising from Surplusage.

The danger arising from surplusage is not only that it exposes the pleading to objection in the manner presently to be pointed out, but that it may seriously increase the difficulty of proof. A traverse cannot indeed, be taken on an immaterial allegation, as has been elsewhere shown, (*Ante*, p. 929, & seq), yet it often happens that when material matter is alleged with an unnecessary detail of circumstances, the essential and non-essential parts of the statement are in their nature so connected as to be incapable of separation, and the opposite party is, therefore, entitled to include under his traverse the whole matter alleged. And thus the party who has pleaded with such unnecessary particularity has to sustain an increased burden of proof, and of course incurs greater danger of failure at the trial. (St. Pl. 425.) The most prominent instances of this consequence following from surplusage are met with in pleadings which set forth the *title to lands*, which, if set forth more particularly than is required by law, yet upon a traverse by the adversary must be proved as stated. Thus, in Sir Francis Leke's Case, (3 Dyer, 365 a & b), the plaintiff, in answer to a cognizance in an action of replevin for cattle taken *damage fesant*, alleged that he was *seised in fee* of an adjacent close to the *locus in quo*, and that Sir Francis Leke, in whose behalf the distress was made, was bound to enclose the *locus in quo*, and that it was by default of a sufficient enclosure that the cattle entered the *locus in quo*. The defendant traversed that the plaintiff was *seised in fee* of such adjacent close, and it was held that the traverse of the *seisin in fee* was proper, and that the plaintiff consequently would have to prove it, although it was unnecessary for him to have alleged such *seisin*, any lawful possession of such adjacent close, even by a mere license of the owner, being sufficient for his purpose. An instance of similar

character is to be found in *Wood v. Hubben*, Hob. 119. And so, if in an action on a promissory note, not negotiable, but expressed to be *for value received*, (which is *prima facie* evidence of valuable consideration), the plaintiff unnecessarily set forth the particulars in which the value consisted, he is bound, upon the general issue, to prove them precisely as laid. (*Jerome v. Whitney*, 7 Johns. (N. Y.) 321.) See 1 Chit. Pl. 262; 3 Saund. 206 & seq, n (22), 207, n (24.)

5<sup>d</sup>. The Mode of Objecting to Surplusage.

Surplusage is not a subject for demurrer, the maxim being that *utile per inutile non vitiatur*. (St. Pl. 424; 3 Th. Co. Lit. 408.) But when any flagrant fault of this kind is brought to the notice of the court, it is visited with the censure of the judges, sometimes very strongly expressed. *Dundass v. Lord Weymouth*, Cowp. 665; *Price v. Fletcher*, Id. 727; *Yates v. Carlisle*, 1 W. Bl. 270.) The pleadings have in such cases been referred to the master (Burr. Law Dict. *Master*), to strike out the redundant matter, and to report by whose fault the redundancy occurred; and in a clear case the court itself, without any reference, will direct such matter to be stricken out; and the party offending will sometimes be required to pay the costs of the application. (1 Tidd Pr. 617; *Yates v. Carlisle*, 1 W. Bl. 270, 291; *Bristow v. Wright*, 2 Dougl. 667, *Cormack v. Gundry*, 3 B. & Ald. (5 E. C. L.) 272; *Brindley v. Dennett*, 2 Ringh. (9 E. C. L.) 184.) In *Yates v. Carlisle*, the conduct of the plaintiff was so vexatious, the pleadings in one case, in consequence of the style of the declaration, being swelled to nearly 2,000, and in another to 3,000 sheets, that the whole costs, to the amount of near £1,000, were ordered to be paid by the draftsman of the faulty pleading, who was interested in the case, and appeared to have been influenced by very improper motives.

SECTION VII.

*Of Certain Miscellaneous Rules.*

7<sup>o</sup>. Certain Miscellaneous Rules.

The rules of pleading hitherto considered have been classed with reference to certain common objects of the art or science (*Ante*, p. 889 & seq.), which each class or set of rules is designed to promote. But there still remain certain rules, also of a principal character, which are not reducible within this principle of arrangement, being in respect of their objects of a *miscellaneous and unconnected kind*. These will form the subject of the present section.

These rules relate to either (1), The declaration; (2), The plea; or (3), Pleadings in general.

1°. Miscellaneous Rules *Relative to the Declaration.*

The first rule under this head stated by Mr. Stephen, in the earlier editions of his book, prior to the Rules of Court of Hilary Term, 1834, is that "The declaration should commence with a *recital of the original writ.*" (St. Pl. 426, n (33); Id. (Tyler), 366.) But as original writs have never been used to commence actions in Virginia, it is enough to mention the rule as once existing in England (Com. Dig. Pleader, (C. 12),) and proceed to set forth the other rules of a miscellaneous character relative to the declaration ;  
W. C.

1<sup>d</sup>. RULE I. THE DECLARATION MUST BE CONFORMABLE TO THE ORIGINAL WRIT.

It will be observed that this rule is very distinct from *reciting the writ*, and in fact only requires, *first*, that the declaration should conform to the old established precedents, which were generally derived very literally from the original writs ; and, *secondarily*, that it should not deviate from the *capias ad respondendum*, or other *judicial* process whereby the original writ was enforced, and which consequently corresponded therewith. (St. Pl. 426 ; Id. (Tyler), 369, &c. ; Com. Dig. Pleader, (C. 13) ; Bac. Abr. Pleas, &c. (B) 4.)

The rule is of very high antiquity, being laid down by Bracton, in the reign of Henry III., (about A. D. 1263,) when pleading was in a very rude and imperfect state. (St. Pl. 226 ; Bract. 431 a, 435 b.)

It is to be taken subject to this qualification, that the declaration, in general, may, and does, so far vary from the writ, or process, that it states the cause of action *more specially*. (St. Pl. 426, n (34) ; Com. Dig. Abatement, (G. 8) ; Id. Pleader, (C. 15) ; 3 Th. Co. Lit. 361-'61.) This the student will see exemplified by comparing the form of the process at pages 524, 525 *ante*, with the declaration, *Ante*, p. 590, in the action of debt. And so, in an action on an assigned bond or promissory note, the assignee, suing in his own name, need not describe himself in the process *as assignee*. It is enough to show in his *declaration* how he derives his title to the assigned security.

In Virginia we apply this rule to the *writ of summons*, or the writ of *capias ad respondendum*, which institutes the suit, and surely with reason. It would be very repugnant to justice and fair dealing to summon a defendant to answer one complaint, and then allow another wholly different to be preferred against him. Upon this principle we transfer to the *writ of summons* most, if not all, of the doctrine of the common law touching the conformity of the declaration to the *original writ*. Let it be observed then, that

every variance, properly so denominated, between the writ and the declaration, is at common law *fatal to the plaintiff's cause*, if the rules of proceeding allow the writ to be inspected, in order to ascertain judicially the existence of the variance. But the writ can only be inspected (in order to *reverse the proceedings*), when it has been made a part of the record, by *craving oyer* of it; and *oyer* is not demandable *after an imparlance*, nor after a *plea in abatement*, nor *a fortiori*, after a *peremptory plea*. (Com. Dig. Pleader, (P.2).)

If the variance be *immaterial* to the real merits, it must at common law be taken advantage of by *plea in abatement*, or by *special demurrer*; but if it be a variance *in substance*, the party, provided he has put the writ into the record, by *craving oyer* of it in time, may avail himself of it by motion in arrest of judgment, or by writ of error, as well as by *general demurrer*. Of this the case of *Watson's Ex'ors v. Lynch's Heirs*, 4 Munf. 94, affords a good illustration. The plaintiff instituted his suit against *four heirs* of Charles Lynch, deceased, upon a bond of C. Lynch, binding his heirs. The writ was returned executed against *three of the heirs*, and as to the fourth, that he was "no inhabitant of the officer's bailiwick," (a return which, as the law then was, abated the suit as to him), and the declaration was then filed against the three heirs on whom the process had been served, taking no notice of the fourth, nor in anywise reconciling the discrepancy from the writ. The defendants *craved oyer* of the writ, and pleaded *performance* of the conditions of the bond, and *no assets* by descent from C. Lynch; on the first of which the issue was found for the plaintiff, and on the second for the defendants; and judgment was rendered for the plaintiff, payable when *assets should arise*, &c. The court of appeals, upon a writ of *supersedeas*, declared the variance between the writ which named *four parties*, and the declaration which named *but three*, to be fatal, notwithstanding there had been no *special demurrer*, nor *plea in abatement*, and the judgment was accordingly reversed and entered for the defendants.

Our former statute of jeofails declared in express terms, that after verdict, or judgment by *nil decet*, &c., judgment should not be stayed or reversed for a variance between the writ and the declaration, &c.; and what is remarkable, the case of *Watson's Ex'ors v. Lynch's Heirs*, just referred to, was decided under that provision; nor is it perceived how else to reconcile the case with the statute than by supposing the court to have thought the statute applicable only to *immaterial variances*, not affecting the merits, and that they deemed the variance in that instance to be too substantial to be passed over.

Mr. C. Robinson, in the first edition of his excellent work on Practice (Vol. I, 158), insists that the only way *at common law* of taking advantage of a variance between the writ and declaration, is by plea in abatement, or *special demurrer*; but in this he seems to have been clearly mistaken, not only from the case of *Watson v. Lynch*, 4 Munf. 94, but from several older authorities. (*Redman v. Edolph*, 1 Saund. 318, n (3); *Norton v. Palmer*, 1 Cro. (Eliz.) 829; *Edwards v. Walkin*, Id. 185; *Helliott v. Selby*, 2 Ld. Raym. 903; S. C. 2 Salk. 701; *Berkenhead v. Nuthall*, Id. 198; *Haslop v. Chaplin*, Id. 330.) But the Code of 1849 makes the law nearly conformable to Mr. Robinson's view, by declaring that a defendant, on whom the process summoning him to answer appears to have been served, shall not take advantage of any defect in the writ or return, or any variance in the writ from the declaration, unless the same be pleaded *in abatement*. (V. C. 1873, c. 167, § 19.)

The English practice in the C. B. since the middle of the last century, and in the king's bench some years later, has been to *deny oyer* of the writ in all cases, in order to discourage objections which tend to defeat justice, and have commonly no connection with the merits of the cause. (*Redman v. Edolph*, 1 Saund. 318, n (3); *Boats v. Edwards*, 1 Doug. 227; St. Pl. 50; Id. (Tyler,) 88.) No similar rule has been adopted in our courts, and the adoption of it in England is very like that *judicial legislation* which is so much to be deplored. Indeed, the inexpediency of the rule seems to condemn it hardly less than the questionable authority whereby it was adopted. Such variances may be very pernicious to the interests of defendants, and the door ought not to be absolutely barred against any objection founded upon them. Sundry cases have occurred in our courts where *oyer* by the writ has been granted. (*Watson's Ex'ors v. Lynch's Heirs*, 4 Munf. 94; *Moss v. Moss' Adm'r*, 4 H. & M. 310; *Stephen v. White*, 2 Wash. 212.)

It may be as well to repeat in this connection, that whilst the writ is, *without oyer*, no part of the record to *reverse the proceedings*, it may be freely appealed to in order to *sustain them*. (*Digges v. Norris*, 3 H. & M. 268; *Turberville v. Long*, 3 H. & M. 309; *Palmer & al v. Mills*, 3 H. & M. 502; *Payne & al v. Gernim*, 2 Munf. 297; but see *Scott & Co. v. Dunlop & als*, 2 Munf. 349; *Shields v. Oney*, 5 Munf. 550; *Pate v. Spotts*, 6 Munf. 394.)

2<sup>d</sup>. RULE II THE DECLARATION SHOULD HAVE ITS PROPER COMMENCEMENT, AND SHOULD, IN CONCLUSION, LAY DAMAGES, AND ALLEGE PRODUCTION OF SUITE.

Let us take notice of, (1), The commencement of the declaration; and (2), Its conclusion;

## W. C.

1°. The *Commencement* of the Declaration.

The commencement of a declaration includes what was formerly described as the *queritur* (*Ante*, p. 568 & seq), and contains a statement, (1), Of the *names of the parties* to the suit; and if they sue or be sued in *another right*, or in a political capacity, (as executors, assignees, or *qui tam*, &c.) of the character or right in which they are parties to the suit; (2), Of the mode in which the defendant has been brought into court; that is, by summons, process of arrest, &c., although this is so merely formal (1 Chit. Pl. 313,) that it is conceived to be better to omit it under our statute (V. C. 1873, c. 167, § 10); and (3), A brief recital of the *form of action* to be proceeded in, (1 Chit. Pl. 311.)

2°. The *Conclusion* of the Declaration.

In the *conclusion* the declaration must, (1), Lay damages; and (2), Allege production of *suite*;

## W. C.

1°. The Conclusion of the Declaration *must lay Damages*.

In *personal* actions (other than *qui tam*), and in *mixed* actions, though it seems not in those *purely real*, which propose to recover only the land, without damages, the declaration should allege in conclusion that the injury is to the *damage* of the plaintiff a *specified sum*. (St. Pl. 428; Com. Dig. Pleader, (C. 84); 1 Chit. Pl. 451; 2 Do. 19.)

In such actions as are *personal*, a distinction exists, it will be remembered, between those which *sound in damages*, such as covenant, assumpsit, debt on bond with collateral condition, trespass, trespass on the case, &c.; and those that *do not sound in damages*, such as the action of debt on a common money bond, or promissory note, &c. In actions that *sound in damages*, damages being the main, or at least one principal object of the suit, they are always laid high enough to cover, and more than cover, the largest sum that the plaintiff can expect to be allowed; but in the other class of actions, which do not sound in damages, the liquidated debt being the main object, damages are claimed only in respect to the detention of such debt, and are therefore, for the most part, *nominal only*, and laid at a small sum. But see *Ante*, p. 528.

The doctrine which is often laid down by the text-writers, that the plaintiff cannot recover more damages than are laid in the conclusion of his declaration (St. Pl. 428-9), must be received with some qualification. If the excess be discovered before the jury are discharged, they must be sent back to reform their verdict, by limiting it to



the damages laid in the declaration. But if it be not observed until the jury are discharged, reference may be had to the writ, in order to *sustain the proceedings*; and if the damages found do not exceed those laid in the writ the verdict will be good. (Palmer & als v. Mills, 3 H. & M. 502; Moss v. Moss' Adm'r, 4 H. & M. 310; Cloud v. Campbell, 4 Munf. 214).

Where the damages assessed by the jury exceed those laid either in the writ or declaration, it constitutes at common law, *after the end of the term*, when the record is consummated, an error, which may be corrected only in an appellate court, notwithstanding the plaintiff is willing to cure it by releasing the excess. By the statute of *jeofails and amendments*, however, in Virginia, the plaintiff may cure the error, if he is so minded, by releasing the excess, either at a subsequent term by an entry of record, or in vacation by a writing signed by him, attested by the clerk and filed among the papers in the cause. (V. C. 1873, c. 177, § 5.)

Finally, it must be noted that in actions on *bonds with collateral condition*, the damages are limited, not only by those stated in the writ or declaration, but also *by the penalty of the bond*. (Payne v. Ellzey, 2 Wash. 145; Johnson v. Merriwether, 3 Call 523; Winslow v. Commonwealth, 2 H. & M. 459.)

2<sup>d</sup>. The Conclusion of the Declaration must allege *Production of Suite*.

This conclusion belongs to the declaration in all actions, real, personal, and mixed.

In ancient times the plaintiff was required to establish the truth of his declaration in the first instance, and before it was called into question upon the pleading, by the simultaneous production of his *secta*, following, or *suite*; that is, a number of persons prepared to vouch for and confirm his allegations. (St. Pl. 429; Bract. 214 b.) Thus, Bracton says, "*et inde statim* (i. e. after the declaration in an action of prohibition), *producat sectam sufficientem, duos ad minus, vel tres, vel plures si possit.*" And thereupon, immediately let him produce a sufficient *secta*, two at least, or three, or more if possible. (Bract. 410 a). "*Producit sectam*" was proffering to the court the testimony of the witnesses or followers, (Gill. Com. Pleas. 48); a protection against unfounded complaints, which Fleta supposed to have been deemed important enough to be in effect provided for in *Magna Charta*, (Fleta, 137), in a passage which he cites as follows: "Nullus liber homo ponatur ad legem, nec ad juramentum, per simplicem loquelam, scire testibus fidelibus

ad hoc ductis." But in the copy of the charter as printed by Rapin, (1 Hist. Eng. B. VIII, p. 289), and taken from a manuscript in the Cotton library as old as King John, the only provision at all of that character is Ch. XLV, which is thus: "Nullus *ballivus* ponat de cetero aliquem ad legem [nec ad juramentum] simplici loquela sua sine testibus fidelibus ad hoc inductis;" which would seem hardly to sustain Fleta's inference.

The practice of thus producing a *secta* gave rise to the very ancient *formula* (as old at least as the time of Richard I), almost invariably used at the conclusion of every declaration, *et inde producit sectam*. And though the actual production has for several centuries fallen into disuse, the *formula* still remains. It had indeed become a *mere form* as early as 7 Edw. II; for in a case in the year-books in that year, we find the court reported as saying, "*cest court* (i. e. the common pleas), *ne sæffre mye la sute estre examiné*." This court suffers not the *secta* to be questioned. (St. Pl. 429, & n (X); 7 Edw. II, 242.) Accordingly, except the court in dower, all declarations constantly conclude thus: "And therefore, (or thereupon) he brings his *suite*," &c. The court in dower concludes without any production of *suite*, a peculiarity which appears always to have belonged to that action, but for which the writer is unable to account.

But the *production of suite* being merely formal, as was remarked above, and not traversable, it may be wholly omitted in Virginia, in pursuance of our statute, (V. C. 1873, c. 167, § 10); and by whatever barbarism substituted, such as, "therefore he sues," &c., it is not the subject of demurrer. (V. C. 1873, c. 167, § 32.)

At the end of the declaration, after the production of *suite*, where the proceeding is in the king's bench, and *by bill*, it is usual, at common law, to add the plaintiff's *pledges to prosecute*; the old law requiring that no plaintiff should be heard to make a judicial complaint without first giving security to prosecute his demand. But in proceedings by original writ, and in the common pleas, pledges are supposed to have been found in the first instance, before the defendant was summoned, and therefore they are omitted at the end of the declaration, except in a few special cases. These *pledges*, however, have long been a mere matter of form, the names of the legal *myths*, John Doe and Richard Roe, being used for them, and no security being actually given by the plaintiff. Consequently they may be, and usually are, omitted in our Virginia practice. (St. Pl. 430 n [35]; 1 Chit. Pl. 453.)

2°. Miscellaneous Rules *relative to Pleas*.

Miscellaneous rules *relative to pleas* may be classified thus, namely: (1), Pleas must be pleaded in due order; (2), Pleas must be pleaded with *defence*; (3), Pleas in abatement must give the plaintiff a better writ; and (4), Dilatory pleas must be pleaded at a preliminary stage of the suit;  
W. C.

1<sup>d</sup>. RULE III. PLEAS MUST BE PLEADED IN DUE ORDER.

The order of pleading has been long established, and must be observed. By a plea of any kind, the party is taken to waive or renounce all pleas of a kind *prior in the series*. The student will readily conceive that pleas of a dilatory class, which *do not relate to the merits* of the cause, ought to be pleaded at its earlier stages, and should otherwise not be allowed at all; and accordingly, we find that the prescribed order takes in, (1), Dilatory pleas; and (2), Peremptory pleas, or pleas in bar. In peremptory pleas no order prevails; all such pleas stand upon the same footing. But dilatory pleas are of several orders or degrees, whereby the succession in which they are to be pleaded is determined, so that this class exhibits a considerable diversity in this particular.

This may be better understood by presenting an analytical table of the order of pleas, discussing them afterwards severally, as may be needful. The order is as follows:

## 1, Dilatory pleas.

1, To the jurisdiction of the court.

2, In suspension of the action.

3, In abatement.

1, To the disability of the person.

1, Of the plaintiff.

2, Of the defendant.

2, To the court or declaration.

3, To the writ.

2, Peremptory pleas in bar of the action.

In this order the defendant may plead all these kinds of pleas successively. Thus, he may first plead to the jurisdiction, and upon demurrer and judgment for the plaintiff (which would be *respondeat ouster*, *Ante*, p. 778), he may resort to a plea *in suspension*, and upon a successful demurrer to that also, and another judgment of *respondeat ouster*, to a plea *in abatement*, for the disability of the person, and so to the end of the series. (St. Pl. 430; 1 Chit. Pl. 474 & seq, 482 & seq; 1 Reeve's Hist. E. L. 451; 2 Do. 266.)

But the defendant is not permitted to plead more than one plea *successively* of the same kind or degree. Thus, he cannot

offer two successive pleas to the jurisdiction, or two to the disability of the person, &c. (St. Pl. 431; Com. Dig. Abatement, (I. 3); Bac. Abr. Abatement, (O).)

And if issue *in fact* be taken upon any plea, though of the dilatory class only, the judgment on such issue, as was formerly explained (*Ante*, p. 778 & seq), is final, and either terminates, or (in case of a plea *in suspension*) suspends the action, so that in that case, he is not at liberty to resort to any other kind of plea whatever. (St. Pl. 431.)

We have seen elsewhere, that in England, under the statute of 4 & 5 Anne, c. 16, allowing in the *discretion of the court* several pleas to be pleaded to the declaration at one time, the courts of that country have steadily refused to permit several *dilatory pleas* to be pleaded at once; and that under our statute, which gives the defendant leave to plead as many several matters, whether of law or fact, as *he* shall think necessary, it seems that there is no authority anywhere to prevent the use of several dilatory pleas of the same, or of different degrees, at one and the same time, or of a dilatory and peremptory plea together, supposing the dilatory plea to be in season. (*Ante*, p. 614.)

It is necessary further to observe, that whilst a defendant is required to plead pleas in the order above stated, yet an exception must be admitted where the matter which is the subject of the plea has happened since the last continuance of the cause, (*puis darrein continuance*); so that no previous opportunity has been allowed for pleading the matter. Otherwise, such matter would not be available to the defendant at all, and that without default on his part. The rules of pleading, therefore, permit matter thus supervening to be pleaded, provided it be done at the *first re-appearance* of the parties; and for that reason, such pleas are denominated *pleas puis darrein continuance*. Thus, in *Hunt v. Wilkinson*, 2 Call. 49, the plaintiff in his declaration designated the defendant *administratrix of C. Hunt*, and obtained an office judgment against her accordingly. Afterwards a will of Hunt was found and proved, and the defendant's letters of administration being revoked, she became *administratrix with the will annexed*; and then the defendant was allowed to plead in abatement of the declaration, by a plea *puis darrein continuance*, that she was *not administratrix of Hunt*, but *administratrix with the will annexed*.

Nothing further need be said in respect to the order in which pleas should be pleaded, save that with us, a plea to the jurisdiction is required to be filed before the "defendant has demurred, pleaded in bar, or answered to the declaration," and before "a rule to plead, or a conditional judgment;" which means in effect, that the plea must be filed

at the same rules at which the declaration is filed. (V. C. 1873, c. 167, § 20, 46; *Ante*, p. 625.)

#### 2<sup>d</sup>. RULE IV. PLEAS MUST BE PLEADED WITH DEFENCE.

*Defence*, in the sense of this rule, signifies a form of words by which the plea is at common law introduced. It is used in almost all actions, the only exceptions remembered being the writ of *dower*, the writ of *assize*, and the writ of *scire facias*. The terms, however, vary in some degree, according to the nature of the action. It will be quite sufficient to mention the form in full, as it is used in *personal actions*, which is as follows: "And the said defendant, by his attorney, comes and defends the wrong, (or in actions of trespass, *the force*), and injury, when and where it shall behove him, and the damages, and whatever else he ought to defend, and says." (Bac. Abr. Pleas, &c. (D); *Ante*, p. 636.)

The word "*comes*" expresses the *appearance* of the defendant in court. It is taken from the style of the entry of the proceedings on the record, and forms no part of the *viva voce* pleading. It is accordingly not considered in strictness a part of the plea. (1 Chit. Pl. 461.)

The word "*defends*," as used in these *formulae*, has not its popular sense. It imports *denial*, being derived from the Law-Latin, *defendere*, or the Law-French, *defendre*, (both of which signify to *deny*); and the effect of the expression is that the defendant denies the right of the plaintiff, or the wrong or force charged.

At a time when this *formula* was more considered than it is now, particular effects were assigned to these, its different clauses. It was said that, by defending "when and where it shall behove him," the defendant impliedly acknowledged the jurisdiction of the court, and by defending the "*damages, and whatsoever else he ought to defend*," he admitted the competency of the plaintiff to sue; that by the former words, therefore, he was precluded from pleading to the jurisdiction, and by the latter, from pleading to the disability of the plaintiff. Hence arose a distinction between "full defence" and "half defence," the former containing all the clauses as above set forth, and the latter being abridged thus: "And the said defendant, by his attorney, comes and defends the wrong, (in an action of trespass, *the force*), and injury, and says." Half defence was used where the defendant intended to plead to the jurisdiction of the court, or to the disability of the party; and full defence in other cases. At length, the practice was established of making defence always with an &c., thus, "And the said defendant, by his attorney, comes and defends the wrong, (or in trespass, *the force*), and injury when, &c., and says,"

it being held that such method would operate either as *full defence* or *half defence*, as the nature of the case should require. (3 Saund. 209 b, n (1); St. Pl. 432, note; 1 Chit. Pl. 462-'3.)

The *vis medicatrix* of the law, whereby it tends (but sometimes very slowly), to reject what is useless and inconvenient, might of itself have finally done away with this superfluous *formula* of defence, without the aid of the legislature; but by statute in Virginia, taken from the English Rules of Court of Hilary Term, 1834, the healing process is accelerated, as we have formerly seen, by the provision that "no formal defence shall be required in a plea; it *shall* commence as follows, 'the defendant says that.'" (V. C. 1873, c. 167, § 29; *Ante*, p. 636-'7.)

3<sup>d</sup>. RULE V. PLEAS IN ABATEMENT MUST, IN GENERAL, GIVE THE PLAINTIFF A BETTER WRIT OR DECLARATION.

This very reasonable rule is not confined to technical pleas in *abatement*, but extends to *all dilatory pleas* in general, as the principle of the rule manifestly requires. That principle is, that in pleading a mistake in the form or mode of bringing the action, which does not go to the merits, the plea must *correct* the mistake, so as to enable the plaintiff to avoid the same objection in framing his new writ or declaration; for these pleas, as tending to delay justice, are not favorably considered in law, and this rule checks the repetition of them. (St. Pl. 431-'2; 1 Chit. Pl. 481; Com. Dig. Abatement, (I. 1); 5 Rob. Pr. 104-'5.) Thus, in a plea to the jurisdiction of the court, the plea ought to show what other court has jurisdiction; and with us, in order to give the plaintiff clearly a better writ, must not only state that the defendant did not reside in the county or corporation in which suit was brought, and that the cause of action, or any part thereof, did not arise there, but must further state where the defendant does reside, *within the commonwealth*, and perhaps the county or corporation wherein the cause of action did arise. (Com. Dig. Abatement, (I. 1); *Mostyn v. Fabrigas*, Cowp. 172; *Middleton v. Pinnell*, 2 Grat. 202.) But see *Warren v. Saunders*, 27 Grat. 265. But if he does not reside within the commonwealth at all, he may be sued in whatever county or corporation he is found, and his non-residency is not available in *any form of plea*. (*Beirne v. Rosser*, 26 Grat. 541-'2.) So, a plea in abatement for the non-joinder of a co-contractor must name *all* the contractors, and not merely some one party who has not been included in the action, (*Wilson v. Nevers*, 20 Pick. (Mass.) 20); and in Virginia, by statute taken from 3 & 4 Wm. IV, c. 42, it must also state that the contractor omitted

is *resident within the jurisdiction of the court*, and the affidavit verifying the plea must state *the place of his residence* with convenient certainty; that is, the county or corporation in which he resides. (V. C. 1873, c. 167, § 21; *Ante*, p. 630-'31)

The rule requiring a dilatory plea, in general, to give the plaintiff a better writ is very ancient, being laid down by Bracton, *temp.* Hen. III, (Bract. 431 b,) and also by Britton, *temp.* Edw. I, (Brit. c. 84,) and both these writers assign for it the obvious reason, that the plaintiff's mistake *shall not be repeated*. (St. Pl. App'x, xcix, note (75).) We find the rule also occurring in the year-books, and recognized in the reports which shortly followed the cessation of that series, as in *Thompson v. Collier*, Yelv. 112.

The rule, however, is not without exceptions, which, for the most part, if not always, arise naturally out of the circumstances.

Thus the rule does not hold in case of a plea in abatement for *absolute disability* of the person to sue or to be sued, at least in the manner attempted, as in a plea of *oullawry*, (*Owen v. Butler*, 1 Ld. Raym, 346); or of *attorney's privilege*, (*Stokes v. Mason*, 9 East. 424; *Chatland v. Thornley*, 2 East. 544; *Langdon v. Potter*, 11 Mass 313; *Hutchinson v. Brock*, 11 Mass. 119, 123; *Jewett v. Jewett*, 5 Mass. 275.)

So also, it does not hold where the plea, though of a dilatory character, yet avoids the whole action, so that no better writ can be given, as in the plea of *non-tenure* by the defendant, of any part of the land claimed, *disclaimer* by the defendant of any title to the subject of the suit, or any matter which, though pleaded *in abatement*, might also be pleaded *in bar*, as for example, in a suit for a penalty, the *pendency of a prior action*, or in replevin, property not in the plaintiff, but *in a stranger*, &c. (Com. Dig. Abatement, (I. 2); *Symonds v. Parmenter*, 2 Str. 1266; *Hutchinson v. Thomas*, 2 Lev. 141; *Jackson v. Gisling*, 2 Str. 1169; *Combe v. Pitt*, 3 Burr. 1433-'4; *Evans v. Stevans*, 9 East. 424; *Chatland v. Thornley*, 12 East. 544; *Otis v. Warren*, 14 Mass. 239; *Dewey v. Brown*, 5 Pick. 238; *Prescott v. Hutchinson*, 13 Mass. 439; *Wilson v. Nevers*, 20 Pick. 23.)

And so, lastly, it does not hold if the matter of the plea be specially *in the knowledge of the plaintiff himself*, as the name and designation of the plaintiff, (5 Rob. Pr. 105; *King v. Cooke*, 2 B. & Cr. (9 E. C. L.) 263; *Earl of Stirling v. Clayton*, 1 Cro. & Mees. 245); or it seems in a plea to the jurisdiction, the county or corporation wherein *the cause of action arose*. (*Warren v. Saunders*, 27 Grat. 265-'6.)

This condition of requiring the defendant to give a *better*

*writ*, &c., is sometimes a criterion, (although, as it seems from the explanation given above, a fallible one,) to distinguish whether a given matter should be pleaded *in abatement* or *in bar*. (1 Saund. 284, n (4); St. Pl. 432; Evans v. Stevans, 4 T. R. 227). The latter kind of plea, as impugning the right of action altogether, can of course give no better writ or declaration; for its effect is to deny that, under any form of writ or declaration, the plaintiff could recover. If, therefore, a better writ or declaration can be given, this shows in general that the plea ought not to be in bar, but in abatement; but it will be remembered that this criterion must be applied with considerable qualification. (St. Pl. 432.)

#### 4<sup>d</sup>. RULE VI. DILATORY PLEAS MUST BE PLEADED AT A PRELIMINARY STAGE OF THE SUIT.

At common law dilatory pleas are, in general, not allowable after *oyer*, nor after a *plea in bar*. (St. Pl. 433; Com. Dig. Abatement, (I. 22), (I. 23).) And besides these, there are other proceedings also, which have the effect of excluding a subsequent dilatory plea; but being of a less ordinary and general kind, it is not necessary here to notice them more particularly. (St. Pl. 433; Com. Dig. Abatement, (I. 26), & seq.)

In Virginia, the preliminary stage of the suit at which dilatory pleas are to be filed is defined with more precision than at common law. Thus, not only are such pleas not allowed in general, *after oyer*, nor *after a plea in bar*, but they are not allowed *after an office-judgment*; for by our statute no office-judgment can be set aside, save by an *issuable plea*, which is well ascertained to mean a *plea in bar*, or *peremptory plea*, and not a *dilatory plea*. (V. C. 1873, c. 167, § 46; *Ante*, p. 601.) And a plea *to the jurisdiction of the court* is required to be filed at a *still earlier stage*, the statute directing that it shall not be received after the defendant has demurred, pleaded in bar, or answered to the declaration, nor after a rule to plead, or a conditional judgment, (V. C. 1873, c. 167, § 20); that is, not *after the rules at which the declaration is filed*. (*Ante*, p. 625; Hunt v. Wilkinson, 2 Call. 49; Bradley v. Welch, 1 Munf. 284; Monroe v. Redman, 2 Munf. 240; Wash. & Tel. Co. v. Hobson, 15 Grat. 132; 5 Rob. Pr. 14.)

The qualifications to be allowed in the case of a plea *puis darrein continuance*, *i. e.* since the last continuance of the cause, have been explained elsewhere. (*Ante*, p. 605, 625.)

3<sup>c</sup>. Rules Relating to all Pleas; W. C.



1<sup>d</sup>. RULE VII. ALL AFFIRMATIVE PLEADINGS, WHICH DO NOT CONCLUDE TO THE COUNTRY, MUST CONCLUDE WITH A VERIFICATION.

Where an issue is tendered, to be tried by jury, it has been shown that the pleading concludes *to the country*. (*Ante*, p. 1035.) In all other cases, pleadings, if in the affirmative form, must conclude with a *formula* of another kind, called a *verification*, or an *averment*. The verification is of two kinds, *common* and *special*. The common verification is that which applies to ordinary cases, and is in the following form: "*And this the said plaintiff*" (or defendant) "*is ready to verify.*" The special verifications are used only where the matter pleaded is intended to be tried or proved by record, or by some other method than a jury. They are in the following forms: "*And this the said plaintiff*" (or defendant) "*is ready to verify by the said record;*" or where the issue is to be tried (or rather proved) by certificate or by witnesses: "*And this the said plaintiff*" (or defendant) "*is ready to verify, when, where, and in such manner as the court here shall order, direct or appoint.*" (*Ante*, p. 1035.) See St. Pl. 433 & seq; Com. Dig. Pleader, (E. 32), (E. 33); 3 Th. Co. Lit. 433, n (M. 1) 434; 1 Chit. Pl. 589, &c., 678, &c.)

The origin of the rule is as follows:

It was a doctrine of the ancient law, that *every affirmative* pleading must be supported by an offer of *some mode of proof*. Bracton and the earliest books on pleading, notably the *Placitorum Abreviatio*, abound in enunciations of the principle, and in instances of its application. Thus, in the declaration, the *secta* or suite may be considered as the proof offered in its support; and the reference to a jury, who, it will be remembered, were originally in the nature of *witnesses to the fact* in issue (*Ante*, p. 574), was deemed an *offer of proof* within the meaning of the doctrine. And whilst, before and at the time when Bracton wrote, a tender of evidence was regarded as a necessary ingredient in all affirmative pleadings, soon after that period the process of pleading began to be conducted with a more distinct and single view to the development of the particular question in controversy, or production of the issue; and when so conducted, the offer of evidence in support of any allegation, would be naturally considered as premature, till it were ascertained that such matter came into dispute. The rule in question appears, therefore, under the influence of this cause, to have suffered a silent abrogation; leaving, however, as vestiges of its former existence, the *production of suite*, the *formal verification*; and perhaps, as we shall presently see, the *profert* of sealed instruments, vouched in

pleading. (St. Pl. 434; Id. Appx. p. c. n (77); Bract. 34 a, 307, 400 a, 215 b.)

When the proof proposed was that by jury (for even in the phraseology of later times, trial by jury is mentioned as a *mode of proof*, (Constable's Case, 5 Co. 108 a), the offer was made in the *viva voce* pleading, by the words *prest d' averrer*, or *prest*, &c., which, in the record, was translated *et hoc paratus est verificare*. On the other hand, where other modes of proof were intended, the record ran, *et hoc paratus est verificare per recordum*, or *et hoc paratus est verificare quocunque modo curia consideraverit*, or in the *viva voce* language of the pleader, *prest d' averrer ou devomus*. (St. Pl. 434-'5.)

But while these were the forms in general observed, there was the following exception, that on the *attainment of an issue*, to be tried by jury, the record marked that result by a change of phrase, and substituted for the verification, the conclusion *ad patriam*, to the country. (St. Pl. 435.)

The written pleadings which, it will be remembered, are framed in general according to the ancient style of the record, still retain the same *formulae* in these different cases, and with the same distinctions as to their use. They preserve the conclusion to the country to mark the attainment of an issue triable by a jury; but in other cases conclude with a translation of the old Latin phrase, *et hoc paratus*, &c.; and hence the rule that an affirmative pleading that does not conclude to the country, must conclude with a verification. (St. Pl. 435; Finch Law, 359.)

As the ancient rule requiring an offer of proof extended only to *affirmative* pleadings, (those of a *negative* kind being in general incapable of proof,) so the rule now in question applies to the former only, no verification being in general *necessary* in a negative pleading; but it is nevertheless the practice to conclude with a verification, all negative as well as affirmative pleadings that do not conclude to the country. (St. Pl. 436.)

The rule, however, has now no longer any value or meaning as regards the object it originally proposed; for till the trial of the issue it is no longer necessary for either party now to refer to his proofs. But as a rule of form, it is attended with the convenience of serving to mark whether the pleading be intended to amount to a tender of issue. (St. Pl. 436.)

2<sup>d</sup>. RULE VIII. IN ALL PLEADINGS WHERE A DEED IS ALLEGED, UNDER WHICH THE PARTY CLAIMS OR JUSTIFIES, PROPERT OF SUCH DEED MUST BE MADE.

Where a party pleads a deed, and *claims* or *justifies* under

it, the mention of the instrument is at common law accompanied with a *formula*, called *making profert*, to this effect, in case of a *deed-poll*: "Sealed with the seal of the said —, and to the court now here shown, the date whereof is the day and year aforesaid;" and in case of a *deed indented*, thus: "One part of which said indenture, sealed with the seal of the said —, the said — now brings here into court, the date whereof is the day and year aforesaid." (St. Pl. 436; 1 Chit. Pl. 397 & seq; Com. Dig. Pleader, (O. 1); Leyfield's Case, 10 Co. 92 & seq, n's (C.) & (E); Moore v. Fenwick, Gilm. 214; *Ante*, p. 591, 593.)

The present practical import of *profert* is that the party has the instrument ready to be produced, if the adversary shall crave *oyer*, that is, to hear it read; and when the pleading was *viva voce*, it implied an *actual production* of the instrument in open court for the same purpose. (St. Pl. 437); W. C.

1°. To what Cases the Rule Applies.

The rule in general applies to *deeds* only, and not to promissory notes or other writings not under seal, nor to writings that are under seal, which yet are not deeds; as for example, a sealed will or award. It includes, however, letters testamentary to executors, and letters of administration to administrators of a decedent, who when *plaintiffs*, must at common law make *profert* of those instruments. (St. Pl. 437; Com. Dig. Pleader, (O. 3.))

2°. Exceptions to the Application of the Rule; W. C.

1°. Where the Party pleading does not *Claim*, nor *Justify* under the Deed.

The rule applies only to cases where there is occasion to *mention the deed in pleading*; notwithstanding it may be in fact the foundation of the case or title pleaded. It extends also to those cases only where the party *claims* under the deed, or *justifies* under it; so that, if it be mentioned only by way of inducement or introduction to some other matter, or be alleged, not to show right or title in the party pleading, but for some collateral purpose, no *profert* is necessary. (St. Pl. 337-'8; 1 Saund. 9 & seq, n (1); Com. Dig. Pleader, (O. 8), (O. 16); 1 Chit. Pl. 398.)

2°. Where the Party pleading does not Rely on the *Direct and Intrinsic Operation of the Deed*.

The rule is confined also to cases where the party relies on the *direct and intrinsic operation of the deed*. Thus, in pleading a feoffment no *profert* is necessary, for the estate passes not by the deed, but by the livery. So no *profert* is required of a conveyance operating under the statute of uses, as *e. g.*, a deed of bargain and sale, because it is the *statute*, and not the deed, that establishes the title.

On the other hand, in case of a *grant* of incorporeal right, or of lands under the statute of grants, the title passes *by the deed*, and the common law would require *profert* of the deed to be made. (St. Pl. 438; 1 Chit. Pl. 398.)

3°. Where the Deed is *Lost or Destroyed*, or is in the *Possession of the opposite Party*.

Another exception to the rule obtains where the deed is *lost or destroyed*, or is in the *possession of the opposite party*. These circumstances dispense with the necessity of *profert*, and the formula is then as follows: "Which said writing obligatory," (or other deed,) "having been lost by lapse of time," (or "by accident," or "destroyed by accident," or "being in the possession of the said ———"), "the said ——— cannot produce the same to the court here." (St. Pl. 439; 1 Chit. Pl. 398; Reed v. Brookman, 3 T. R. 156; Carver v. Pinkney, 3 Lev. 82.)

3°. The Origin and Reason of the Rule requiring *Profert of a Deed*.

The reason usually assigned for the rule requiring *profert* is that the court may be enabled by inspection to judge of the sufficiency of the deed, (3 Th. Co. Lit. 370; Layfield's Case, 10 Co. 92 a, b.) But Mr. Stephen insists with great show of reason, that it is another relic of the original rule of pleading, that every affirmative allegation must be supported by an offer of some *mode of proof*. (St. Pl. 439-'40; Id. Appendix, p. cv. n (80).) The examples cited by Mr. Stephen in his Appendix, p. cv, n (80), are in themselves very curious and interesting, and leave little room to discredit his conclusion.

4°. The Actual Value of the Rule, and the present Doctrine touching *Profert* in Virginia.

The actual value of the rule consists in enabling the adversary to obtain inspection (by demanding *oyer*,) of the instrument. And where the instrument is such that no *profert* need be made, the opposite party has no means of obtaining an inspection of it but by application to the court, which will generally make an order for the purpose as a matter of course. But so merely formal has *profert* long been regarded, that for many generations the omission of it can only be taken advantage of by *special demurrer*; and in Virginia, it is provided by statute, that "It shall not be necessary, in any action, to make *profert* of any deed, letters testamentary, or commission of administration; but a defendant may have *oyer* in like manner as if *profert* were made." (V. C. 1873, c. 167, § 9; St. Pl. 440; 1 Chit. Pl. 399; Com. Dig. (O. 17).)

3<sup>d</sup>. RULE IX. ALL PLEADINGS MUST BE PROPERLY ENTITLED.

That all pleadings must be properly entitled, namely, of the *court and term* at common law; of the *court and day* under the rules of Hilary Term, 1834; and in Virginia, of the *court and rules* when filed; is an ancient principle of pleading, of which some account was given *Ante*, p. 568, and which has been amply illustrated in many examples in the foregoing pages; and to that exposition reference must now be had. It need only be added here, that the title of the court must be stated, as it is by law appointed to be, and that the title of the *circuit court* is "Circuit court for the county (or corporation) of ———;" and of a *corporation court* generally: "Corporation court for the city of ———." (Va. Const. 1869, Art. VI, § 12, 14; V. C. 1873, c. 154, § 34; Id. c. 155, § 1, 2.)

4<sup>d</sup>. RULE X. ALL PLEADINGS OUGHT TO BE TRUE.

While this rule is recognized, it must be observed, that in general, no way is provided to enforce it, because regularly there is no proper mode of proving the falsehood of an allegation till issue has been taken, and trial had upon it. And persons not unfrequently take advantage of this difficulty to put in *sham pleas*, which the pleader knows to be false, for the mere purpose of delay. (St. Pl. 442; Evans' Pl. 96.)

In Virginia, such *sham pleading* is practically confined to actions of debt, assumpsit, and covenant, for demands *in the nature of debts*. In most other actions, where a number of witnesses are usually to be examined, the plaintiff is seldom ready to try the cause at the first term, so that a continuance is so much a matter of course as to make a *sham plea* on the part of the defendant superfluous. The recent wholesome legislation upon the subject has indeed so curtailed, if it has not annihilated, the benefits arising from such pleas, that they may be expected to go in practice out of use. See *Ante*, p. 600; Acts, 1874-'5, p. 48, c. 65; and V. C. 1873, c. 167, § 28.

The courts have often censured the practice of *sham pleading*, and have power to punish it. And in some cases, where the plea contained very improbable matter, and the frame of it was subtle and intricate, so as to suggest the inference, that it was pleaded merely for purposes of delay, the court has on motion, supported by affidavit of the falsehood of the plea, allowed judgment to be taken by the plaintiff, as by default, and made *the defendant or his attorney pay the costs*. The following are some of the cases where this course was followed: *Pierce v. Blake*, 2 Salk. 515; *Blewitt v. Marsden*, 10 East. 237; *Thomas v. Vandermoolen*, 2

B. & Ald. (4\* E. C. L.) 197; Shadwell v. Berthond, 5 B. & Ald. (7 E. C. L.) 750; Jones v. Studd, 4 Bingh. (15 E. C. L.) 663; Vere v. Carden, 5 Bingh. (15 E. C. L.) 413; Smith v. Hardy, 8 Bingh. (21 E. C. L.) 435. In *Merrington v. Becket*, 2 B. & Cr. (9 E. C. L.) 81; and *Smith v. Backwell*, 4 Bingh. (15 E. C. L.) 512, the court, whilst expressing a strong disapproval of sham pleas, declined to strike out the plea, and to allow judgment to go as by default.

It will be remembered, however, that in Virginia there are certain pleas and defences which cannot be received until *they are sworn to*, and thus, in those cases, sham pleas are practically avoided. These pleas and defences are the following:

(1), *Dilatory pleas* of all kinds, although in the statute loosely designated as *pleas in abatement*.

See V. C. 1873, c. 167, § 38; *Ante*, p. 625.

(2), Plea of *non est factum*.

See V. C. 1873, c. 167, § 38; *Ante*, p. 625, 640-'41.

(3), Plea of *special set-off*.

See V. C. 1873, c. 168, § 5; *Ante*, p. 626, 662, 667.

(4), Proof of *hand-writing*.

Where a declaration or other pleading alleges that any person *made, endorsed, assigned, or accepted* any writing, no proof of the *hand-writing* of such person shall be required, unless the fact be denied by an *affidavit*, filed with the plea or other pleading which puts it in issue. (V. C. 1873, c. 167, § 39; *Ante*, p. 625; *Kelly v. Paul*, 3 Grat. 191; *Shepherd v. Fry*, 3 Grat. 442; *Phaup v. Stratton*, 9 Grat. 615; *Archer v. Ward*, 9 Grat. 522.)

(5), Proof of *partnership or incorporation*.

Where the plaintiffs or defendants sue, or are sued, *as partners*, and their names are set forth in the declaration; or where plaintiffs or defendants sue, or are sued, *as a corporation*; it shall not be necessary to prove the fact of the partnership, or incorporation, unless, with the pleading which puts the matter in issue, there be an *affidavit denying such partnership or incorporation*. (V. C. 1873, c. 167, § 40; *Ante*, p. 625; *Shepherd v. Fry*, 3 Grat. 442.)

It may be observed finally, in respect to this rule, that some exceptions exist to it in the case of certain allowed fictions, which have been devised in order to facilitate the administration of justice. Thus, the declaration in an action of *trover* alleges, without regard to the fact, that the defendant *found* the goods which he is charged with having converted to his own use, and for the value of which the suit is brought. So in *express color*, a feigned title is imputed to the plaintiff, in order to enable the defendant to show forth his title at large upon the record. And formerly, in the

action of ejectment, a series of fictions were resorted to for the purpose of saving trouble, and yet of fitting that action to be maintained to recover *freehold estates*. In this latter case, these fictions have been abolished in Virginia by statute; but in the other two, and in a number of cases besides, fictions are still employed.

### CHAPTER III.

#### THE CONCLUSION OF THE DISCUSSION OF PLEADING.

#### 3<sup>a</sup>. The Conclusion of the Discussion of Pleading.

The conclusion of this dissertation upon the conduct and rules of actions at common law will lead us to advert to (1), The characteristic peculiarity of common law pleading, and the causes thereof; (2), The methods of juridical altercation in other systems of law; (3), The advantages of the common law method of altercation; (4), Objections to the common law method of pleading, and the modes adopted to obviate the same;

W. C.

#### SECTION i.

##### *Of the Characteristic Peculiarity of Common Law Pleading.*

#### 1<sup>b</sup>. The Characteristic Peculiarity of Common Law Pleading, and the Causes thereof.

Let us recall, (1), The characteristic peculiarity of common law pleading; and (2), The causes of that peculiarity;

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#### 1<sup>c</sup>. The Characteristic Peculiarity of the Common Law System of Pleading.

This and the following topics have been so repeatedly under consideration in the course of this protracted discussion, that nothing more will be now attempted than to present analytically the outline of the subject, with such enlargement only as will make the heads intelligible, and will recall to the student's memory the exposition which, in various passages, has heretofore been made of them.

The characteristic peculiarity of the common law system of pleading, it will be remembered, is that it aims to *produce an issue*, and an issue with *certain marked traits of singleness, materiality and certainty*, free from *obscurity and confusion*, and without unreasonable *prolixity or delay*; and that in the first of those particulars, namely, in seeking, by the effect of the altercation itself, without any retrospective analysis, to expel all irrelevant matter, and by alternate allegations con-

tinually to narrow the subject of controversy, until one or a few definite points are developed, on which, by mutual consent, the result of the dispute is to turn, which is denominated *the issue*, or *the issues*, it stands in prominent contrast with all other systems of forensic statement. (*Ante*, p. 887 & seq.; St. Pl. 444 & seq.)

2<sup>c</sup>. The Causes of the Marked Peculiarity of Common Law Pleading.

The marked peculiarity of common law pleading is by Mr. Stephen referred with great probability, to the three causes following:

W. C.

1<sup>d</sup>. The Aid this System Afforded to the *Pleader's Memory*.

The practice of *oral pleading* which prevailed in the English courts would have made the Roman or Scottish system intolerably burdensome to the memory, by obliging each party to retain the whole tenor of his adversary's statement in mind, however complicated with a multiplicity of averments, whilst the system in question required that he should remember only the single averment, or a small number of definite averments last made by his opponent, to each of which he was allowed to make but one reply. (*Ante*, p. 888; St. Pl. 126.)

2<sup>d</sup>. The different *Methods of Trial* at Common Law for different Questions.

Questions of law were, at common law, decided *by the court*, and questions of fact usually *by a jury*, but sometimes also, according to their nature, in other modes. It was, therefore, indispensable that the system of altercation should be such as would *discriminate the precise point* to be determined in order to know to which of the arbitrations provided by the law it should be referred for decision. By the Roman law, all questions of every description were submitted to the court, and consequently this necessity did not exist. (*Ante*, p. 888; St. Pl. 127-'8, 445 & seq.)

3<sup>d</sup>. The General *Prevalence of Jury-trial*, in common law causes, as to Questions of Fact.

The jurors being originally *recognitors* (that is, witnesses) rather than *triers* of the questions of fact submitted for decision, it was necessary to employ the specific and definite mode of averment which the rules of common law pleading enjoin, in order to attach to each fact alleged a place and a time for its occurrence, so that the sheriff, in executing the writ of *venire facias*, might have the means of summoning such persons as should be prepared to *recognize* of the truth of the matter. And in modern times, although the jurors no longer depend upon their *personal cognizance* to arrive at the determination of the issue, but decide upon the evi-



dence adduced before them, it is yet essential that a similar precision of statement should prevail, with a view to *apprize the litigants* of the exact question to be tried, so that they may be guided in preparing their proofs. Nor is it less essential for the sake of the jurors than of the parties; for however intelligent jurors may be, they are not fitted to try ill-defined issues, susceptible of ramifications without number, and of a comprehensiveness practically without limit. All things considered, jury-trial is probably the best that the wit of man has devised to try single and specific questions of fact, and to assess damages for wrongs, &c.; but it forfeits its best claim to respect when the issue or issues it is employed to determine are not clearly ascertained, or are too numerous, or too comprehensive. (St. Pl. 133 & seq; *Ante*, p. 553.)

## SECTION II.

*Of the Methods of Juridical Altercation in other Systems of Law.*2<sup>b</sup>. The Methods of Juridical Altercation in other Systems of Law.

The methods of juridical altercation, besides that of the common law, employed for the purpose of developing the merits of causes with a view to their decision, are the two following, of which the second is merely a modification of the first, namely, (1), The method employed in the Roman law; and (2), The method employed in the Scottish law;

W. C.

1<sup>c</sup>. The Method of Juridical Altercation employed in the Roman Law.

The Roman law seeks to make no public adjustment whatever of the *precise question* for decision. For as by that law all matters, whether of law or fact, are decided by the judge, and by him alone, upon proofs adduced by the parties on either side, one of the necessities upon which that practice has been shown to be founded in the common law, does not arise. Hence the mutual allegations are allowed to be made *at large*, as it may be called; that is, with no view to the exposition, by force of the pleading itself, of the particular question in the cause. The litigants, indeed, before they proceed to proof, must explore the precise point or points of the controversy, in order to ascertain whether any proof be required, and to guide them to the points to which their proof is to be directed. And upon the hearing of the cause the judge also must of course ascertain for his own information the exact matter to be decided, and consider in what manner it is met by the evidence. But in these proceedings, neither the court nor the parties have any public exposition of the point in

controversy to guide them, and they judge of it, each according to his individual discretion and acumen, upon a retrospective examination of the pleadings. (St. Pl. 447; *Ante*, p. 552.)

Nor does the practice of the courts of equity, which for the most part conforms to the Roman law, constitute an exception to the general statement just made. For, though the *replication*, as it is called, propounded to the defendant's answer, offers a formal and *general* contradiction thereto,—a contradiction which imitates in some measure the form of an issue in the common law, and borrows its name, yet in substantive effect the two results are quite different; for the contradiction to which the name of an issue is thus given in the equity pleading is of the most general and indefinite kind, and develops no particular question as the subject for decision in the cause. (St. Pl. 447, n (d).)

2<sup>c</sup>. The Method of Juridical Altercation *employed in the Scottish Law*.

The method of juridical altercation employed in the Roman law is well nigh universal in all judicatures wherein, as in that system, all questions, whether of fact or law, are decided by the judge. But in the Scottish judicature, another at present prevails, which is a modification of the method of the Roman law, made necessary by the engrafting upon the juridical system of Scotland of the trial by jury in civil causes. That change in the mode of trial led of course to the public adjustment and settlement between the parties of the particular question or questions on which the decision of the jury is to be taken. But instead of eliciting such question (called by analogy to the common law, the issue,) by the mere effect and operation of the pleading itself, according to the practice of the common law, the issue is adjusted and settled *retrospectively* from the allegations, by an act of the court; and these allegations have consequently continued to be made *at large*, as in the Roman law, although the court requires the parties to supply condensed abstracts of such statements, denominated *condescendences* and *answers*, from which the issue to be tried is adjusted. (St. Pl. 448, & n (e).)

SECTION iii.

*Of the Advantages of the Common Law Method of Pleading.*

3<sup>b</sup>. The Advantages of the Common Law Method of Pleading.

The advantages of the common law method of pleading may be referred to the heads following: (1), The undisputed or immaterial matter is cleared away by the effect of the pleading itself; (2), The precise points admitted and denied respectively are ascertained with certainty; and (3), The

parties are made acquainted in advance of the trial with the precise points to be tried ;

W. C.

1<sup>c</sup>. The Undisputed or Immaterial Matter is cleared away *by the Effect of the Pleading itself.*

Every controversy involves more or less of undisputed and immaterial matter, and all this is by the common law system of pleading cleared away by the effect of the pleading itself ; and therefore, when the allegations are finished, the essential matter for decision necessarily appears. (St. Pl. 449.)

Under the rival plans of proceeding, by which the statements are allowed to be made *at large*, it becomes requisite, when the pleading is over, to analyze the whole mass of allegations, and to effect, for the first time, the separation of the undisputed and immaterial matter, in order to arrive at the essential question. This operation will be attended with more or less difficulty, according to the degree of vagueness or prolixity in which the pleaders have been allowed to indulge ; but where the allegations have not been conducted upon the principle of coming to issue, or in other words, have been made *at large*, it follows from that very quality, that their closeness and precision can never have been such as to preclude the exercise of any discretion in extracting from them the true question in controversy ; for this would amount to the production of an issue. Hence, it will always be in some measure doubtful, or a point for consideration, to what extent, and in what exact sense, the allegations on one side are disputed on the other, and also to what extent the law relied upon by one of the parties is controverted by his adversary. And this difficulty, while thus inherent in the mode of proceeding, will be often aggravated, and present itself in a more serious form, from the *natural tendency* of judicial statements, when made *at large*, to the faults of vagueness and prolixity. For where the pleaders state their cases in order to present the materials from which the mind of the judge is afterwards to inform itself of the point in controversy, they will of course be led to indulge in such amplification on either side, as may put the case of the particular party in the fullest and most advantageous light, and to propound the facts in such form as may be thought most impressive or convenient, though at the expense of clearness or precision. On the other hand, it is evident that, upon the common law method, the pleaders having no object but to produce the issue, are in general without inducement, either to an uncertain, or a too copious manner of statement ; and on the contrary, have a mutual interest to effect the result at which they aim in the shortest and most direct manner. (St. Pl. 449-50.)

2<sup>c</sup>. The *precise Points* admitted and denied respectively, are *ascertained with certainty*.

The difficulty that must always be found under the method of pleading at large, in ascertaining the precise extent of the mutual admissions of fact or law, is attended with this obvious inconvenience: that a party may be led to proceed to proof or trial upon matters not disputed, or not considered as material to be disputed, on the other side; or to omit the proof or trial of matters which are meant to be disputed, and which are in fact essential to the final determination of the cause. The judge may consequently find, upon examination of the whole process, and hearing the farther allegations and arguments of the parties, that the investigation of fact has either been redundant, and therefore attended with useless expense and delay; or defective, so as not to present him with the materials on which he can properly adjudicate. (St. Pl. 450-'51.)

On the other hand, these evils are almost unknown to the common law system of judicature. The mode of pleading which it adopts ascertains with certainty the *precise point or points* admitted and denied respectively, and excludes all such embarrassments as are liable to attend the rival plans of procedure. (St. Pl. 451.)

And in this connexion it may be observed, that the system of pleading adopted by the common law merits praise in consequence of the pains it takes, by numerous and exacting rules, to prevent *obscurity* or *confusion*, and *prolixity* or *delay*, (*Ante*, p. 1011 & seq, 1038 & seq.) These objects are indeed not peculiar to the common law system, for the avoidance of such faults is, of course, in some measure, the aim of every enlightened plan of judicature; but in general, there is either a want of regulation to *enforce* the object, or the regulation is ineffectual.

Accordingly, the common law mode of pleading has ever been proverbial for the success with which it has avoided *obscurity* or *confusion*; and although much less felicitous in guarding against *prolixity*, yet in modern times, under the influence of enlightened judges, and with the aid of some prudent legislation, the principle of avoiding unnecessary allegation has wholly removed the ancient and notorious reproach of undue amplification. (*Ante*, p. 1045 & seq, V. C. 1873, c. 167, § 8 to 12, 14, 18 & seq.)

3<sup>c</sup>. The Parties are made acquainted, in Advance of the Trial, *with the precise Points to be tried*.

The parties, having been made acquainted by the pleadings, and the definite and precise issues made up thereon, with the point or points to which the trial must relate, and on which its result must depend, will be plainly enabled thereby to

come *prepared with their proofs and reasonings* to meet the case as it will be presented.

The contrast which the common law system of pleading presents in this particular, to the other systems has already been made apparent, under the heads immediately preceding. (St. Pl. 450-'51; *Supra*, 1° and 2°.)

#### SECTION IV.

#### *Of the Objections to the Common Law Method of Pleading, and the Modes of Obviating the Same.*

##### 4<sup>b</sup>. Objections to the Common Law Method of Pleading, and the Modes of Obviating the Same.

Whilst the system of pleading practised at common law is in general distinguished for the excellence of its structure, it cannot be denied that, in some particulars, it is justly liable to animadversion. The student has had an opportunity to discover in the foregoing pages how much has been done by the good sense of judges, and the wise intervention of the legislature, from time to time, to obviate these objections. But it will be well now to close this part of the present disquisition by a statement of the objections, and a view of the extent to which they have been removed, examining, (1), The objections to the common law method of pleading as stated by Mr. Stephen, and the modes of obviating the same; and (2), The objections to the system propounded by Mr. Hugh Davey Evans, and his suggested remedies therefor;

W. C.

##### 1<sup>c</sup>. Objections to the Common Law Method of Pleading as stated by Mr. Stephen, and the Modes of Obviating the Same.

Let us attend under this head to, (1), The objections as stated by Mr. Stephen, and the present state of the law thereupon; and (2), The devices adopted by the courts to remove or palliate the objections;

W. C.

##### 1<sup>d</sup>. The Objections to the Common Law Method of Pleading as stated by Mr. Stephen, and the present State of the Law thereupon.

Mr. Stephen sums up the objections to this famous system under the heads following: (1), Its occasional tendency to decide causes upon mere points of form; (2), Its insisting on an absolute singleness of issue; (3), The wide effect allowed to the general issues, especially those of *nil debet*, and *non assumpsit*; and (4), Its excessive subtlety and needless precision;

W. C.

##### 1<sup>e</sup>. The Tendency of the System occasionally to Decide Causes upon mere Points of Form.

The specifications under this head relate to the allowance of, (1), A demurrer, which may finally determine the fate of the cause, for a statement insufficient merely in form; and (2), Certain pleas of a dilatory character, as for *misnomer*, &c.

W. C.

- 1<sup>st</sup>. The Allowance of a Demurrer, which may finally determine the Fate of the Cause, *for a statement insufficient merely in Form.*

In general, whenever a demurrer occurs in respect of insufficiency in the manner of statement, and not for insufficiency in substance, the issue joined involves a question of form only; yet as the issue, whatever its nature, is held by the common law to be, in general, decisive of the fate of the cause, the action in such a case may be decided upon a point of form, and not upon the merits of the case; a result that seems inconsistent with substantial justice, although when it occurs, it arises from a very censurable lack of both skill and care on the part of the pleader.

Thus, if the plaintiff, in an action of trespass, should happen to omit in his declaration to state the day or place at which the trespass was committed, and the defendant should demur specially for this omission, and the issue joined on that demurrer should be decided (as at common law it must be), in favor of the defendant, by the regular consequence judgment would be also given for the defendant, and the plaintiff's action would be defeated by the omission of a few words in his declaration; and of words too which he is not required to prove, and which his adversary cannot controvert. (*Ante*, p. 574-'75.) To be sure, such an error can be the result only of gross ignorance or neglect; and to be sure also, it may, by the modern practice, be amended by the leave of the court as soon as it is discovered before the judgment upon the demurrer is consummated. (*Ante*, p. 893.) But notwithstanding these considerations, the understanding and conscience are alike shocked at the needlessness of the requirement, as the law has been for several centuries, and at the possible consequences of its violation, and yet the requirement continued in full force in Virginia until 1st July, 1850.

Our legislation, however, has now wisely discarded the necessity for such averments, by declaring that "All allegations which are not traversable, and which the party could not be required to prove, may be omitted, unless when they are required for the right understanding of allegations that are material;" and that "No action shall

abate for want of form, where the declaration sets forth sufficient matter of substance for the court to proceed upon the merits of the cause." (V. C. 1873, c. 167, § 10, 11.) And much less wisely, as it appears to the writer, it has gone very far indeed in a direction quite opposite to the fault of the common law system, by disallowing under all circumstances (except as to dilatory pleas), objections of form which do not prevent the court from giving judgment *according to law and the very right of the cause*. The language of the statute is, "On a demurrer, (unless it be to a plea in abatement), the court shall not regard any defect or imperfection in the declaration or pleadings, whether it has been heretofore deemed mispleading or insufficient pleading or not, unless there be *omitted* something so essential to the action or defence, that judgment, *according to law and the very right of the cause*, cannot be given. No demurrer shall be sustained, because of the omission in any pleading of the words, 'this he is ready to verify,' or 'this he is ready to verify by the record,' or 'as appears by the record;' but the opposite party may be excused," (surely not without a remarkable inconsistency!) "from replying, demurring, or otherwise answering to any pleading which ought to have, but has not, such words therein *until they be inserted*." (V. C. 1873, c. 167, § 32; *Smith v. Lloyd*, 16 Grat. 313; *Carroll Co. v. Collier*, 22 Grat. 308.)

We have seen that the great objection to this legislation is that it deprives the courts of the control which they ought to have over the forms of pleading, tending to make the forms vague and uncertain, obscure and prolix, according to the varying capacity and discernment of the pleaders severally, to the great inconvenience of opposing counsel, the annoyance of the courts, and to the hindrance and delay of justice. (*Ante*, p. 620-'21, 891-'2, 564-'5.)

It is not denied that the common law, in the particular in question, called for some reform; but it is submitted whether it would not have been more judicious to adopt the suggestion of Mr. Evans, in his essay on pleading, and allowing the doctrine of special demurrer, as it was under the statutes of 27 Eliz. c. 5, and of 4 Anne, c. 16, and under our statutes prior to 1850, (see *Ante*, p. 619-'20), to require that the judgment for the demurrant, on special demurrer, should always be "*respondeat ouster*," that the party *answer over, or again*. (Evans' Pl. 180.)

2<sup>d</sup>. The Allowance of certain Pleas of a *merely Dilatory Character*, such as for the *Want of Jurisdiction* in the Court, or for *Misnomer*, &c.

At common law, if defendant should plead to the *jurisdiction* of the court, or in *abatement*, as for example, that either his name or the plaintiff's is stated erroneously in the writ or declaration, and the plaintiff should choose to take issue in fact upon the plea, and go to trial, the verdict, if given for the plaintiff, entitles him to judgment *quod recuperet*, and he consequently recovers his demand. The case is otherwise, however, if the plaintiff succeeds on an issue *in law* on a dilatory plea, for there the judgment is *respondeat ouster* only. (*Ante*, p. 777, 778, 779.) On the other hand, if the verdict be given for the defendant, in case of a plea to the *jurisdiction*, it is followed by a judgment that the *court will not take further cognizance of the action*; and in case of a plea in *abatement*, that the *writ (or declaration) be quashed*; and thus the action in the last case, and in the other, the action and the demand itself are disposed of upon a mere question as to the jurisdiction of the court, or the name of one or other of the parties.

It is undeniably proper that the defendant should be allowed to urge any objection that he may conceive to exist to the jurisdiction of the court, provided he does it at an early period of the altercation. Nor is it less proper that he should have a right to require that the *true name* of the plaintiff, as well as of himself, should be set forth in the pleadings; for if either name were mistaken, the record would not protect him against another suit for the same cause of action. The doctrine touching the plea to the jurisdiction, and most pleas in abatement, remains substantially as at common law; but for the plea in abatement for *misnomer*, with its awkward consequences as above stated, a very happy and effectual substitute is provided by statute, taken from 3 & 4 Wm. IV, c. 42, which declares that "No plea in abatement for a *misnomer* shall be allowed in any action; but in a case wherein, but for this section, a *misnomer* would have been pleadable in abatement, the declaration may, on the *defendant's motion*, and on affidavit of the right name, be *amended* by inserting the right name." (V. C. 1873, c. 167, § 18; *Ante*, p. 630.) The plaintiff is not concerned in the correctness of the name, and has no occasion to object to any name that the defendant may assign to either party.

2°. That the Common Law System of Pleading insists upon an *Absolute Singleness of Issue*.

It is stating the objection more strongly than the truth warrants to say that the common law insists upon an *absolute singleness* of issue. It does not indeed permit more than one answer to be given to the *same matter*, by the *same*



*party*; but as it allows several causes of action to be included (in different counts) in one declaration, so it allows, if necessary, an answer to each of them; and as several defendants may be joined in one action, and each may give a separate answer to the declaration; and as, in the third place, any party may give one answer to one part of his adversary's pleading, and another to another part, it follows that in all these three cases there may be, even at common law, a multiplicity of issues.

But granting to the objection all the force which may be claimed for it, it has been to a great degree removed in England by the statute 4 & 5 Anne, c. 16, and to a still greater degree in Virginia by our corresponding statute, (V. C. 1873, c. 167, § 24; *Ante*, p. 614), allowing "the *defendant* in any action to plead as many several matters, *whether of law or fact*, as he shall think necessary." This relaxation does not indeed avail the plaintiff at all in his replication or subsequent pleadings, nor the defendant at any stage subsequent to the *plea*; and as it is apparent that two or more true and real answers may often present themselves to the same matter at *any period* of the altercation, it may seem in every such case a hardship to deny to the party the privilege of exhibiting in his pleading his whole case as it actually exists. But in an art so practical as that with which we are now dealing, some regard must be had to the consequences of allowing an unlimited multiplication of issues, in respect to trying and disposing of them. If such multiplication were allowed it would probably be necessary to abandon trial by jury, and also the *viva voce* examination of witnesses. For with a large number of issues no jury is competent to deal, nor would it be in practice possible to procure the attendance, at one and the same time, of the great array of witnesses that would often be required where the issues were numerous.

Mr. Stephens, however, in the earlier editions of his treatise, intimates the opinion, that if the parties were restrained from raising issues inconsistent with each other, or such as they knew to be without foundation in fact, they might be permitted, without inconvenience, to present as many as the circumstances really require. And he conceives that too much latitude has been allowed in the use of *repugnant counts* and *repugnant pleas*, whereby the principle of *singleness* has been mischievously trenching upon, without any corresponding advantage in the administration of justice. (St. Pl. 452, n (39, 2).) In this sentiment, Mr. Evans concurs, insisting that the privilege of several answers ought to be extended to *all stages* of the pleadings. (Evans' Pl. 180, 192 & seq.)

Whether Mr. Stephen's omission of this suggestion in the later editions of his work (those following the introduction of the reforms of 1834), evinces a change of view on this point, the writer cannot venture to affirm; but it may well be supposed, although what he says of the allowance of repugnant counts and repugnant pleas seems to merit not a little consideration.

3°. *Wide Effect* allowed in certain Actions to the General Issue therein.

This objection to the common law system of pleading may be most distinctly exhibited by observing, (1), The general issues which are peculiarly liable to animadversion; (2), The objections to those issues; and (3), The corrections of them which have been interposed by statute;

W. C.

1°. The general Issues which are *peculiarly liable to Animadversion*.

The general issues which, from the wide effect allowed them, are especially objectionable, are the general issue of *nil debet*, in the action of debt on simple contract, of *non assumpsit*, in the action of assumpsit, and of *not guilty*, in the action of trespass on the case in general. These issues, as we have seen, embrace almost every ground of defence to which the defendant at the trial may choose to resort, the questions submitted by them being in effect merely these, whether the defendant be indebted to the plaintiff as alleged in the declaration, or whether he be liable to the plaintiff as alleged in the declaration. (*Ante*, p. 641 & seq.)

2°. The objections specifically to these wide and vague Issues.

The objections to issues so vague and wide as these are extremely cogent. They may be summed up thus, namely, that (1), They do not effect the separation of the fact and the law; and (2), They conceal the case to be made at the trial, and so tend to occasion surprise to the parties;

W. C.

1°. These wide and vague Issues do not effect the Separation of the Fact and the Law.

The parties cannot go to trial before a jury upon a mere question of law, because a traverse of matter of law is not allowable; yet it is in the nature of many issues in fact, (and notably of those under consideration,) to involve some subordinate legal question, the decision of which is indispensable to the decision of the issue. And the wider and more general the form of the issue, the more likely it is to comprise these subordinate questions of law. For example, in an action of debt on sim-

ple contract, or in assumpsit, if the defendant rely on a release executed by the plaintiff, he may give this in evidence under the general issue (*nil debet* or *non assumpsit*), because a release tends to show that he is not indebted, or is not liable as alleged; and if the plaintiff's answer to the release be that it was obtained by *duress*, this will, of course, be also offered in evidence under the same issue. Upon this point of duress, two questions may be supposed to arise: first, whether the execution of the deed under duress would defeat the effect of the deed; secondly, whether the deed were in fact executed under duress. Before the jury can find a verdict for either the plaintiff or defendant, both these questions must be disposed of. But the first is a question of mere law, and their decision upon it must be guided by the direction of the court. Here, then, is a question of law involved under the issue in fact, instead of being separated from it, and referred to its proper arbitrament. (St. Pl. 453, n (39, 3).)

Now if, on the other hand, recurrence be had to a form of action in which the pleading is more special, and the general issue less comprehensive, for example, the action of covenant, this very same question will be distinctly developed as a point of law upon the pleading, by way of demurrer. For the defendant cannot, under the general issue in that action (*non est factum*), set up the release, but must plead it specially, and the plaintiff must consequently plead the duress in reply; and then, if the defendant disputes the legal consequence of the duress, his course is to demur to the replication. (St. Pl. 453, n (39, 3); Id. 60, 61.)

Thus it appears that it is the effect of the wider general issues to render less complete than it otherwise would be, the separation of fact from law. And the inconvenience of this is felt, in the frequency with which difficult legal questions arise for the opinion of the judge at the trial, in the numerous attempts made in the appellate courts to obtain a revision of such opinions, and in the delay and expense necessarily attendant on a proceeding of this kind, when compared with the regular method of demurrer. (St. Pl. 453, n (39, 3).)

2<sup>d</sup>. These wide and vague Issues *Conceal the Case to be made at the Trial*, and so tend to occasion *Surprise to the Parties*.

Another inconvenience arising from general issues of this description is, that they tend to conceal from each party the case meant to be made by his adversary at the trial. Thus, in the instance first above supposed, of

the issue of *nil debet* or *non assumpsit*, the plaintiff would have no notice, from the nature of the issue, that the defendant meant to rely on a release; nor would the defendant, on the other hand, have any intimation that the release was to be met by the allegation of duress. And thus is partially defeated another of the advantages otherwise attendant on the production of an issue, viz: that of apprising the parties of the precise nature of the question to be tried, and enabling them to shape their proofs without danger of either redundancy or deficiency. (St. Pl. 453, n (39, 3).)

3<sup>d</sup>. The Provisions interposed by Statute to correct the *Mischiefs arising from these Wide and Vague Issues*.

Let us note the provisions which have been made for this purpose, (1), In England; and (2), In Virginia.

1<sup>st</sup>. The Provisions made in England to obviate the Mischiefs of the Wide and Vague Issues above referred to.

We have seen that in England, by the Rules of Court of Hilary Term, 4 Wm. IV, these and the other general issues were materially circumscribed in scope and effect. Thus,—

The plea of *non est factum* denies that the deed mentioned in the declaration is the deed of the defendant. Under this plea the defendant is by the rules referred to allowed to contend at the trial, that the deed was *never executed in point of fact*. But he cannot under this plea deny its validity *in point of law*, as for example that the maker was at its date a *married woman*. (St. Pl. 159; Id. App'x, p. lviii.)

The plea of *never indebted* (the substitute for *nil debet*, which latter is in no case allowable), is adapted to the case where the defendant means to deny the matters of fact from which the debt alleged may be implied by law. Thus he may, under this plea, deny that the goods were sold and delivered to him *in point of fact*; but he cannot insist that the contract of sale was *void in law*. (St. Pl. 159; Id. App'x, p. lviii.)

The plea of *non assumpsit* operates as a denial *in fact* of the express contract or promise alleged in the declaration, or of the matter of fact from which the contract or promise alleged may be implied by law, but not of the *validity of the contract*. And in *assumpsit*, upon a promissory note or bill of exchange, the plea of *non assumpsit* is prohibited always, and the defendant is required to deny *specially* so much of the declaration as he means to traverse, *e. g.* the making, drawing, endorsing or accepting, &c. (St. Pl. 160-'61; Id. App'x, p. lvi.)

The plea of *non detinet* operates as a denial of the deten-

tion by the defendant of the goods in the declaration specified; but the defendant cannot, under this plea, deny that the goods were the *plaintiff's property*. (St. Pl. 159; Id. Appendix, p. lviii.)

The plea of *not guilty* in trespass amounts to a denial of the trespasses alleged, and *no more*. Thus, in trespass for assault, &c., this plea is proper if the defendant means to *deny the assault*, but in no other case. So in trespass *quare clausum fregit*, or *de bonis asportatis*, the defendant may deny under this plea that *he broke the close*, or that *he took the goods*; but the plaintiff's possession, or right of possession, *of the close*, or his *property in the goods* cannot, under this plea, be controverted. (St. Pl. 159-'60; Id. Appendix, p. lx.)

The plea of *not guilty* in trespass on the case operates as a denial of the *breach of duty* or *wrongful act* alleged against the defendant; but it admits no other evidence than that which tends to show that he *did not commit* the act or default imputed to him. (St. Pl. 160; Id. Appendix, p. lviii, lix.)

2<sup>s</sup>. The Provisions made in *Virginia* to Obviate the Mischiefs of the Wide and Vague Issues above referred to.

In Virginia, the legislation has been far less complete. No change is made by statute in the scope or effect of any of the general issues. They are left just as at common law. But the general assembly has not been wholly unmindful of the exigency, having provided an imperfect substitute for the judicious English reform by declaring that "In any action or motion the court may order a statement to be filed *of the particulars of the claim*, or *of the ground of defence*; and if a party fail to comply with such order, may, when the case is tried or heard, exclude evidence of any matter not described in the notice, declaration, or other pleading of such party, so plainly as to give the adverse party notice of its character." (V. C. 1873, c. 172, § 49.)

This provision, although introduced by the Code of 1849, seems to have been in a degree lost sight of by the profession, and is believed to have been very rarely invoked, notwithstanding the practical advantage to be often derived from it in the latitudinous general issues of *nil debet*, *non assumpsit*, &c.

4<sup>s</sup>. The *Excessive Subtlety and Needless Precision* of the Common Law System of Pleading.

It cannot be denied that the common law system of pleading had come by degrees to be characterized in some of its parts by an excessive subtlety and a needless preci-

sion which, in its palmyest days, did not belong to it. (*Ante*, p. 562-'3.)

But, in Virginia, this objection may be considered as practically and in effect removed by the two statutory provisions already more than once referred to; the one declaring that all allegations which are *not traversable*, and which the party could not be *required to prove*, may be omitted, unless where they are required for the right understanding of allegations that are material, (V. C. 1873, c. 167, § 10); and the other forbidding any demurrer to be sustained for a *defect of form*. (V. C. 1873, c. 167, § 32.)

- 2<sup>d</sup>. The devices adopted by the Courts more completely to *obviate the Objections to the Common Law System of Pleading*.

The devices adopted by the courts to obviate more completely the objections to the common law system of pleading may be stated thus: (1), A bill of particulars; (2), Hypothetical instructions or directions as to the law of the case, from the court to the jury; (3), Bills of exception for misdirection by the court; and (4), The allowance of amendments to pleadings;

W. C.

- 1<sup>o</sup>. A Bill of Particulars.

A bill of particulars was first devised *by the courts* as a rule of practice, in order to reduce too vague a demand or defence to the required certainty, as in the case of assumpsit or debt for goods sold, work done, &c., or for the particulars of objection to a title in an action upon an agreement to make one, and in some cases for wrongs done. And on the part of the defendant, the particulars of a set-off, &c. (1 Tidds' Pr. 596 & seq; *Le Breton v. Braham*, 3 Burr. 1390; *Kitchen v. Blanchard*, 1 Bos. & Pul. 378; *Catlett v. Thompson*, 3 Bos. & Pul. 247; *Squire v. Todd*, 1 Campb. 293; *Webster v. Jones*, 7 Dowl. & R. (16 E. C. L.) 774; *Adlington v. Appleton*, 2 Campb. 410; *Retallick v. Hawkes*, 1 Mees. & W. 573.) A similar bill of particulars has been long specifically provided for by legislation in Virginia, but only in the *action of assumpsit*, where the plaintiff is required to "file with his declaration an account, stating distinctly the several items of his claim, unless it be *plainly described in the declaration*," (V. C. 1873, c. 167, § 13); and a more general requirement of the same kind, at the special instance of the opposing party, is provided for by the statute referred to *Supra*, p. 1080; (V. C. 1873, c. 172, § 49).

- 2<sup>o</sup>. Hypothetical *Instructions or Directions* as to the Law of the Case, from the Court to the Jury.

These hypothetical instructions or directions (*prayers* they

are often called, because they are asked or *prayed* for), import that, "if the jury shall believe from the evidence that such and such facts are proved, then the law applicable thereto is so an so." And it is apparent, as Mr. Evans observes, that this is neither more nor less than the application of the principles of pleading in a new form, (Ev. Pl. 103); a *mere inversion*, and an awkward one, of the system we have been examining.

This latter system seeks to develop the several specific points of the controversy, whether of fact or of law, by mutual allegations; and when the issue or issues have by this means been with due deliberation ascertained, they are presented for trial to the appropriate tribunal, questions of law to the court, and questions of fact, for the most part, to a jury. The modern device of *instructions* proposes to plunge into the trial upon very vague and indeterminate averments on both sides, and, therefore, without any previous adequate development of the specific points to be determined, and expects to separate the law from the facts amidst the tumult and hurry of the courtroom, and the excitement of the contest before the jury, by appeals to the court to pronounce upon the law, upon hypothetical statements of the facts, making no provision at all to define sharply the questions of fact on which it is agreed or expected that the controversy shall turn.

Let it be remembered that, whilst the object of pleading, whether direct, or in this inverted fashion, is to *ascertain the subject of decision*, this object is important for three purposes, namely:

- (1), To enable the parties to prepare for the trial of the cause, and the discussion which is to attend it;
- (2), To refer the controversy to the proper tribunal; and
- (3), To enable that tribunal to decide the cause with the greatest possible correctness, facility, inexpensiveness, and dispatch. (Ev. Pl. 115-'16.)

It can, consequently, hardly be denied, as Mr. Evans observes, that the merits of any system of pleading may fairly be tested by the perfectness with which it achieves and secures these objects. And few candid and dispassionate inquirers can examine the plan and operation of the two systems above referred to, which may be designated respectively as the *old* and the *new*, without conceding a decided superiority to the old.

With reference to the *first purpose*, the parties to the controversy come into court, under the old system, perfectly aware of the precise point or points upon which it is to turn. In the other, they, or what is yet more pernicious and unjust, one of them, may be entirely ignorant, even

after the jury is sworn, what are the facts or doctrines about which it is intended to debate; unless indeed, so far as they may have gained some knowledge casually, or by conjecture, or by the courtesy of the adversary.

With respect to the *second purpose* of pleading, namely, to refer the controversy to the proper tribunal, less difference exists between the systems, and for the sake of brevity, it may be conceded that they possess advantages nearly equal.

With respect to the *third purpose* of pleading, as above described, the advantages are very much on the side of the *old* system of special pleading. The points to be determined being under that system specific, and ascertained beforehand, are more easily understood; the proofs and arguments are more likely to be duly marshalled on both sides; long and expensive delays do not occur, with a jury awaiting the result, whilst law points are under discussion; and if mistakes are made in the court of original jurisdiction, they are more readily and effectually amended in a court of review. See Evans' Pleading, 114 & seq, where this subject is discussed with much ability.

3°. Bills of Exception for *Misdirection by the Court*.

The nature and use of a bill of exceptions have been amply discussed elsewhere (*Ante*, p. 728, 742 & seq); and from those expositions, it is apparent how needful this contrivance is to prevent parties from being injured by a hasty and unconsidered, or at all events, an erroneous judgment of the court before which a trial takes place.

4°. A free Allowance of *Amendments to Pleadings*.

Special pleading, in the state to which after the reign of Henry VII it had degenerated, and ere yet it had been pruned of the absurd and injurious subtleties and excrescences with which it was over-laid, having suffered therefrom much obloquy, was at length in practice to a large extent superseded by the loose system of allegations, of which the general issues, and especially those of *nil debet* and *non assumpsit*, constituted a type; and the consequence of the frequent use of that looser system was in turn the introduction of hypothetical instructions, which, however, were found liable to two capital objections, namely, (1), That they give to the opposite party no notice, previous to the trial, of the real nature of the controversy, thus increasing the expense of trials, by increasing the number of witnesses summoned; and (2), That they produce but a temporary separation of the questions of law and fact, of which the record contains no certain memorial, because the law is propounded hypothetically, leaving the jury to determine whether the state of facts exists to which the in-



struction is applicable. And hence both the expense and delay of litigation are increased by the necessity of new trials. (Ev. Pl. 132-3.)

These and other objections having, in some degree, checked the growing tendency to install vague and general averments, aided by hypothetical directions, in lieu of special pleading, a disposition has been more recently evinced to employ, as an antidote to the real or supposed mischiefs of the latter, the power of *amendment*; that is, the power to either party to alter his pleadings, with the leave of the court, (which is practically never denied), even *after the jury is sworn*. For this freedom of amendment, it will be remembered that liberal provision is by statute made in Virginia. (V. C. 1873, c. 173, § 7; 1 Rob. Pr. (1st ed.) 233 & seq.)

Too great facility of amendment may doubtless tempt pleaders to negligent allegation in the first instance, and may thereby induce a delay in the trial of causes which is to be deprecated; but it is not perceived that the privilege and practice, as it exists amongst us, merit the sharp animadversion which is directed towards it by Mr. Evans. (Ev. Pl. 133 & seq; Id. 239.)

2°. The Objections to the Common Law System of Pleading, *as stated by Mr. Hugh D. Evans*, and his Remedies therefor.

We will take notice of, (1), The objections of Mr. Evans; and (2), The remedies he proposes;  
W. C.

1<sup>d</sup>. The Objections to the Common Law System of Pleading, *as stated by Mr. Hugh D. Evans*, and the present State of the Law thereupon.

Mr. Evans enumerates the objections following, namely, (1), The needless forms with which the system is overlaid; (2), Its complication, and the time required to acquire a knowledge of it; (3), Its demand for singleness of issue; and (4), Its tendency to decide causes *not on their merits*;  
W. C.

1°. That the System is *Overloaded with Unnecessary Forms*.

See Ev. Pl. 131; St. Pl. 2nd App'x, p. cxlviii.

This objection is not unfounded, as the system had been by degrees perverted from its original simplicity. But it could not be fairly imputed to it until comparatively modern times. Thus Lord Hale states that pleadings in the times of Henry VI, Edward IV, and Henry VII, "were *far shorter* than afterwards, especially after Henry VIII, yet they were much longer than in the time of King Edward III; and the pleaders, yea the judges too, became somewhat *too curious* therein. So that that art, or dexterity of pleading, which in its use, nature, and design was only

to render the fact plain and intelligible, and to bring the matter to judgment with a convenient certainty, began to degenerate from its primitive simplicity, and the true use and end thereof, and to become a *piece of nicety and curiosity*; which how the later times have improved, the length of the pleadings, the many and unnecessary repetitions, the many miscarriages of causes upon small and trivial niceties in pleading, have too much witnessed." (Hale's Hist. Com. Law, 211-'12.)

Lord Hale then proceeds to set forth the reasons for this decline in the character and style of pleading, which he conceives to be the following:

(1), That in ancient times the pleadings were *drawn at the bar*; that is, as is supposed, by lawyers practising at the bar, instead of by special pleaders, whose sole employment it is to draft such writings.

(2), That those parts of pleading which in ancient times might perhaps be material, but at a later period were become only *mere styles and forms*, were notwithstanding still continued religiously; and so all those ancient forms at first introduced for convenience, but *now not necessary*, or it may be antiquated as to their use, were yet continued as things wonderfully material, though they only *swelled the bulk*, and contributed nothing to the weight of the pleading.

(3), That the pleadings were mostly drawn by clerks, who were paid *for entries and copies thereof*; the longer the pleadings were, the more profits came to them, and the dearer the clerk's place, the dearer he made the client pay.

(4), An over-forwardness in courts to give countenance to frivolous exceptions, though they made nothing to the true merits of the cause; whereby it often happened that causes were not determined according to their merits, but did often miscarry for inconsiderable omissions in pleading. (Hale's Hist. Com. Law, 212.)

At present, however, and for many years past, the courts, both in England and the United States, have been astute to discountenance and reprove all frivolous exceptions, and to forward as much as possible the true merits of every cause. And in Virginia particularly, this disregard of form has been carried farther than, as it seems to the writer, prudence could warrant, especially in the provision so often referred to, declaring that "on a demurrer, (unless it be to a plea in abatement), the court shall not regard any defect or imperfection in the declaration or pleadings, whether it has heretofore been deemed mispleading or insufficient pleading or not, unless, there be omitted some-

thing so essential to the action or defence, that judgment according to law and the very right of the cause cannot be given." (V. C. 1873, c. 167, § 32.) And when to this provision are added, amongst others, the enactments that "No action shall abate for want of form, where the declaration sets forth sufficient matter of substance for the court to proceed upon the merits of the cause," (V. C. 1873, c. 167, § 11); and that "All allegations which are not traversable, and which the party could not be required to prove, may be omitted, unless when they are required for the right understanding of allegations that are material," (V. C. 1873, c. 167, § 10); it would seem that, howsoever else the system of pleading may be reproached, it is not in Virginia amenable to the charge of being "over-loaded with unnecessary forms!"

- 2°. That the System is *Complicated*, and Requires a great Expenditure of Time to acquire a Knowledge of its Details.

See Ev. Pl. 131; St. Pl. 2d Appendix, p. cxlviii.

The useless and now discarded subtleties of the system of pleading incorporated into it after the time of Henry VII, did undeniably require a great expense of time to become familiar with their details, and without any correspondent collateral advantage. But as it now is, especially in Virginia, under a legislation generally astute to reform abuses and to retain what is really good, no unreasonable portion of time is necessary in order to perfect one's acquaintance with the minutest details; and probably in no other way can the same amount of time and pains be bestowed so profitably with a view to a wide and accurate perception of the legal principles and doctrines which relate to *rights*, as well the rights which concern persons as those which concern things.

The writer cannot too strongly enforce upon the student, as the result of many years of his own personal experience and observation, that there is no way so sure to a precise and extended knowledge of the law as through the art of pleading; nor is there any way more easy, if the study is prosecuted with vigor and constancy, and from time to time reviewed. Amongst all the wise utterances of that great lawyer, Thomas Littleton, not one is more worthy to be heeded by the professional tyro than what he says upon this subject, which, although before quoted, (*Ante*, p. 562), will bear repetition: "And know my son," says he, "that it is one of the most honorable, laudable and profitable things in our law, to have the science of well-pleading in actions real and personal; and therefore, I counsel thee especially to employ thy courage and care to learn this." Nor can the writer forbear to cite again Lord Coke's com-

ment: "Here is to be observed the excellency of good pleading, and Littleton's grave advice, that the student should employ his courage and care for the attaining thereof, which he shall attain unto by these means: first, by *reading*; secondly, by *observation*; and thirdly, by *use and exercise*." (3 Th. Co. Lit. 376.)

- 3°. That the System excludes a party (by demanding *Singleness of Issue*), from availing himself of *all Existing Answers* to his Adversary's Allegations.

See Ev. Pl. 131; St. Pl. 2nd App'x, p. cxlviii.

This objection has been already sufficiently dilated upon.

See *Ante*, p. 1075.

- 4°. That it tends to Decide Causes, *not on their Merits*, but on *mere Matter of Form*.

See Ev. Pl. 131; St. Pl. 2nd App'x, p. cxlviii.

This objection also has been already discussed. See *Ante*, p. 1073 & seq.

- 2<sup>d</sup>. The *Remedies proposed by Mr. Evans* for the Defects he States.

These remedies may be summed up under the following heads, namely: (1), To abolish all needless forms; (2), To require a precise statement of the matter relied on; (3), To extend the privilege of several answers to all stages of the pleading; (4), To let judgment for the demurrant, on special demurrer, be always (with some limitation) *respondeat ouster*; and (5), To allow no amendments of pleadings after the jury is sworn;

W. C.

- 1°. To abolish *Needless Forms*.

See Ev. Pl. 180; St. Pl. 2nd App'x, p. clii; *Ante*, p. 1085-'6.

- 2°. To require a *Precise Statement* of the Matter Relied on.

See Ev. Pl. 186.

The object in view, and Mr. Evans' arguments, would seem especially to condemn the vague and indefinite *general issues*, of which too much has been said in former passages of this dissertation, to make it needful to add anything here. (*Ante*, p. 634, 641 & seq, 1076.)

- 3°. To extend the Privilege of *Several Answers to all Stages of the Pleading*.

See Ev. Pl. 191, 192 & seq.

The grounds upon which the writer presumes to dissent from this suggestion are stated, *Ante*, p. 1076-'7.

- 4°. To let judgment *for the Demurrant*, on *Special Demurrer*, be always (with some limitations,) *Respondeat Ouster*.

See Ev. Pl. 180, 232, 233.

This recommendation seems to be worthy of universal adoption. It is surely an expedient to be preferred to the

alternative adopted in Virginia, of doing away with special demurrer altogether; that is, not allowing *defects of form*, except in dilatory pleas, *to be objected to at all*. (*Ante*, p. 564-'5, 620-'21, 891-'2, 1074.) As a check upon the delays which might arise from repeated amendments, Mr. Evans proposes that such demurrers should be limited to a few days after the filing of the pleading called in question; that a few days should be allowed for amendment of the errors pointed out in the demurrer; that a second or subsequent demurrer should be confined to the amendments; and that the new demurrer, or other answer to the amended pleading, should be restricted to a few days after notice of the amendment. (Ev. Pl. 232-'3.)

5°. To allow *no Amendments* of the Pleadings *after the Jury is Sworn*.

See Ev. Pl. 238 & seq; St. Pl. 2d Appx. p. clii.

The reasons stated by Mr. Evans for this favorite suggestion, which he renews and insists upon more than once, have not a little plausibility and apparent force. But the mischiefs so strongly stated by him of allowing amendments, even after the jury is sworn, have not, it is believed, presented themselves in practice in Virginia, and our statutes provide for them with great freedom. (V. C. 1873, c. 173, § 7; *Ante*, p. 1084.)

## CHAPTER IV.

### OF THE FORMS OF PLEADING AND PRACTICE.

#### 4°. The Forms of Pleading and Practice.

It is proposed in the necessarily brief and imperfect collection of forms subjoined to this exposition of the doctrines and principles which regulate pleading and practice in civil cases, to embrace forms of most of the writings, assurances, and instruments for which a practitioner will have occasion, whether in court or in the country, including forms of writs and of pleadings. The design, however, is not so much to afford a *full collection* of precedents for practice, as to illustrate to the student the principles of the various proceedings which he will be called upon to conduct. Notwithstanding, for this latter purpose the precedents must be so numerous and varied as to serve, to a considerable extent, the uses of the practitioner when more copious collections are not at hand.

The precedents which must be given will occupy so much space as to make it indispensable to reserve them for an appendix, which it may not be possible to include even in the present volume.

## DIVISION V.

## THE PURSUIT OF REMEDIES BY PROCEEDINGS IN COURTS OF PROBATE AND ADMINISTRATION, AND OF POLICE AND ECONOMY, AND IN MOTIONS GENERALLY.

V. The Pursuit of Remedies by Proceedings in Courts of *Probate and Administration, and of Police and Economy, and in Motions Generally.*

This head corresponds to Division IV, (*Ante*, p. 516), "The pursuit of remedies *by actions at common law*;" and so many incidental explanations have been given in previous passages of this work, of the subjects properly belonging here, that the extreme brevity with which they must now be treated will not occasion, it is hoped, serious inconvenience to the reader.

Let us bestow some brief attention upon the proceedings in (1), The courts of probate and administration; (2), The courts of police and economy; and (3), In motions generally;

W. C.

1<sup>a</sup>. The Proceedings in *Courts of Probate and Administration.*

The proceedings in courts of probate and administration have been pretty fully set forth in connection with *devises of real property*, (2 Insts. Com. & Stat. Law, 932 & seq), and also in the present volume, (*Ante*, p. 81 & seq); and with a reference to those explanations the subject must now be dismissed.

2<sup>a</sup>. The Proceedings in *Courts of Police and Economy.*

It will be remembered that the cognizance of causes relating to police and public economy belongs in Virginia to (1), Justices of the peace, (*Ante*, p. 278); (2), The county courts within the several counties of the commonwealth, (*Ante*, p. 217-'18.) And (3), The corporation courts, within their respective corporations, (*Ante*, p. 224.) And at those passages will be found the needful discriminations in respect to the authority in such matters of these several tribunals.

The mode of proceeding in causes of police and economy is divested of all technicality. The case is sometimes presented, as in applications for the opening of public roads, or for the establishment of mills and ferries, by way of motion, which ought regularly to be founded upon a petition *in writing* from the applicant or applicants, setting out succinctly, but plainly, the considerations, public and private, which are supposed to support the application. The want of a written petition, however, is not necessarily fatal, if, upon the whole record, the case appears to have been one proper for the consideration of the court. And any formal defect of this character is waived by the adversary omitting to make the objection, and proceeding to

contest the application upon its merits, as in the case of a highway, by demanding a writ of *ad quod damnum*. (1 Insts. Com. & Stat. Law, 117 & seq; Carpenter v. Sims, 3 Leigh, 675; Bernard v. Brewer, 2 Wash. 76; Zane v. Zane, 2 Va. Cas. 63; Mead v. Haynes, 3 Rand. 83; Hunter v. Matthews, 1 Rob. 468; Whitworth v. Puckett, 2 Grat. 528; Sampson v. Goochland Justices, 5 Grat. 241; Lewis v. Washington, 5 Grat. 265; White v. Coleman, 6 Grat. 138; Kelley's Case, 8 Grat. 632; Mairs v. Gallahue, 9 Grat. 94; Mitchell v. Thornton, 21 Grat. 164; Jeter v. Board, 27 Grat. 910.)

In other cases of the exercise of police authority, the cause comes into court at the instance of a party aggrieved by the action of a subordinate officer of the law, as where a conservator of the peace in the county, such as a justice or a commissioner in chancery, has required surety of the peace or of good behavior, and the person required to give such surety, on giving it, appeals to the county or corporation court. (V. C. 1873, c. 196, § 1 & seq.)

And yet again, such cases come into court where, upon an application to an overseer of the poor, by or in behalf of an alleged pauper or pauper's family, the overseer refuses either provisions or assistance, the county or corporation court may direct it to be given. (1 Insts. Com. & Stat. Law, 126; V. C. 1873, c. 47, § 53.) The proceedings against vagrants may also be referred to this head, and also for binding apprentice pauper children; (1 Insts. Com. & Stat. Law, 127-'8); and formerly proceedings touching bastards; but in Virginia, those proceedings are now abolished, as is apprehended without due consideration. (1 Insts. Com. & Stat. Law, 128.)

### 3<sup>a</sup>. The Proceedings in *Motions Generally*.

In many cases the law authorizes judgment to be entered and execution to be awarded in a *summary way* upon motion, which is understood to dispense with any formal pleading or issue. (McKinster v. Garrott, 3 Rand. 554); but in every case where a *summary remedy* is thus provided, the plaintiff must show himself in all respects entitled to the benefit of it, or else he cannot have judgment. The courts, indeed, do not favor the extension of summary remedies, whereby speedy *injustice* is not seldom perpetrated for want of that lucid exposition of the claims and rights of the parties which the system of pleading tends to bring about, and in consequence of the precipitancy with which the cause, even though submitted to a jury, is liable to be tried. The suitor, therefore, is not to be ousted of the ordinary modes of procedure in actions, except by express or clearly implied legislative declaration of an intent that it shall be so; and whatever jurisdiction is appointed for the cognizance of any motion, in that jurisdiction alone is it to be tried. (1 Rob. Pr. (1st ed.) 589; Mayor v. Hunter, 2 Munf. 228, Stew-

art v. Hamilton, 2 H. & M. 54; Greenhow v. Barton, 1 Munf. 593; Amis v. Koger, 7 Leigh 223.)

Let us advert to (1), The notice to be given of the motion; (2), The trial and judgment; and (3), The various prominent instances of motions allowed by law;

W. C.

1<sup>b</sup>. The *Notice to be given of the Motion*.

In prosecuting the remedy by motion, the law always provides that the party proceeded against shall have due notice thereof, which is in all cases *ten days*, unless some other time be specified in the statute which gives the motion, (V. C. 1873, c. 163, § 4); and this is to be construed as *including* the day on which the notice is given, but *excluding* that on which the motion is to be made. (V. C. 1873, c. 15, § 9, (cl. 8).)

There are very few instances where more than *ten days'* notice is required, but two prominent cases may be named, to-wit: the case of a motion for money due on contract, as a statutory substitute for an action, where *sixty days'* notice must be given, (V. C. 1873, c. 163, § 6); and secondly, the case of a motion on a forfeited forthcoming bond, where the original debt was incurred prior to the 10th of April, 1865, in which case no judgment is to be rendered until after three months' notice to the obligors. (V. C. 1873, c. 49, § 43.)

In prudence the notice should be *in writing*, but it seems to be in general not indispensable. Its purpose is to acquaint the defendant with the grounds on which he is to be proceeded against; and if it be so plain that the defendant cannot mistake the object of the motion, it suffices, however wanting it may be in form and technical accuracy. Being usually drawn not by lawyers, but by the party plaintiff himself, it is viewed with indulgence, and although, if too vague and indefinite to warrant the interposition of the court, it will be fatal, (Coffman v. Sangston, 21 Grat. 267), yet it is to be construed with favor, the court striving to apply it according to the truth of the case, so far as its terms will admit. (1 Rob. Pr. (1st ed.) 589; Graves v. Webb, 1 Call. 443; Segouine v. The Auditor, 4 Munf. 398; Steptoe v. Same, 3 Rand. 221; Supervisors, &c. v. Dunn, 27 Grat. 612.) But if it descend to particulars, as to dates, sums and names, the documents referred to, when produced must correspond with the notice, or no judgment can be given. (1 Rob. Pr. (1st ed.) 590; Drew v. Anderson, 1 Call. 51; Cookes v. Patriotic Bank, 1 Leigh, 433.)

A few instances will serve to illustrate the general rule. In Lemoigne v. Montgomery, 5 Call. 528, a notice for a motion on a forthcoming bond, signed by the plaintiff, was held to be sufficient, although it did not state to whom the bond was payable, the defendant being obliged, in reason, to conclude that it was payable to the plaintiff. So in Booth v. Kinsey, 8



Grat. 560, a notice on a forthcoming bond was held to be not defective for omitting the obligors, to whom the notice was not designed to be given. And in *Segouine v. Auditor*, 4 Munf. 398, a notice for a motion for a judgment against a sheriff for the *amount* due on executions for fines put into the sheriff's hands, "as appears by a copy of his receipt," was deemed sufficient, without mentioning the aggregate sum due, the amount of each execution, or the time of delivery to the sheriff. So, in *Hendricks v. Shoemaker*, 3 Grat. 197, a joint notice to a constable and his sureties, for defaults of the constable in several cases, in respect to the same plaintiff, set forth in an accompanying list, was held sufficient. (Bart. Pr. 331-2.) So, in *Monteith v. Commonwealth*, 15 Grat. 172, it was held that a notice against a sheriff for failing to pay taxes collected need not state on what bond of the sheriff the motion will be made. And in *Supervisors, &c. v. Dunn*, 27 Grat. 612, a notice against a sheriff (D.) and his sureties, of a motion for judgment for \$4,840.03, "the same being the amount of the said D.'s deficiency and default for county levies for the year 1869, that went into the said D.'s hands as sheriff, and which he failed to account for and pay over," &c., was determined to be sufficiently specific and definite to warrant a judgment thereon.

If, however, there be, in the opinion of the defendant, any uncertainty in the subject to which the motion is to relate, it may be removed at the defendant's instance, by applying to the court for an order to compel the plaintiff to *file the particulars of his claim*, in pursuance of the statute so repeatedly mentioned. (V. C. 1873, c. 172, § 49; *Ante*, p. 634, 1080; Bart. Pr. 33.)

As to the mode of *serving the notice*, it will be sufficient to observe, that it is done in like manner as *process is served*, (whether by personal service or by order of publication, *Ante*, p. 532 & seq; V. C. 1873, c. 163, § 1, 2.) And the student will be careful to note, that in the case of corporations, if the notice be served on any other officer than those named in the statute, the service is void and of no effect. (*Fairfax v. Alexandria*, 28 Grat. 16, 29; *Alexandria v. Fairfax*, 5 Otto, (95 U. S.) 779-'80.) Those officers, it will be remembered, are the mayor, rector, president, or other *chief officer*, or in his absence from the county or corporation in which he resides, or in which is the principal office of the corporation, if the corporation be a city or town, on the president of the council, or the board of trustees, or in his absence, on the recorder, or any alderman or trustee; and if it be not a city or town, on the cashier or treasurer; and if there be none such, or he be absent, on a member of the board of directors, trustees, or visitors. (V. C. 1873, c. 166, § 7.)

2<sup>d</sup>. The *Trial and Judgment* in Motions.

The motion should be made on the day to which the notice is given; or at least *docketed* on that day, and then regularly continued from that day until the day on which it is heard by the court. And if not thus regularly continued, as if, without the defendant's consent, it be continued from the *June* until the *August* term, passing by the intermediate *July* term, it is a *discontinuance*, and puts the motion out of court. (Parker v. Pitts, 1 H. & M. 4; Amis v. Koger, 7 Leigh, 223.) In a motion, however, to recover money, allowed by statute as a substitute for an action, it is specially provided that, when docketed by the clerk just before a term, along with other cases to be disposed of at that term, pursuant to V. C. 1873, c. 173, § 1, it shall not be discontinued by reason of no order of continuance being entered in it from one day to another, or from term to term. (V. C. 1873, c. 163, § 6.)

When an issue of fact is to be tried in a motion, and either party *desire it*, or the court shall *deem it proper*, a jury shall be impaneled, unless the case be one in which the recovery is limited to an amount not greater than \$20, exclusive of interest. (V. C. 1873, c. 163, § 8; Claflin v. Steenbock, 18 Grat. 846.)

A person entitled to obtain judgment for money on motion may as to any, or the personal representatives of any, person liable for such money, move severally against each, or jointly against all, or jointly against any intermediate number; and when the notice of his motion is not served on all of those to whom it is directed, judgment may nevertheless be given against so many of those liable as shall appear to have been served with notice. Such motions may be made from time to time, until there is judgment against every person liable, or his personal representative, (V. C. 1873, c. 163, § 7). This statute appears to be simply affirmatory of the pre-existing law in relation to motions, (Wilson v. Stevenson, 2 Call. 213; Glassel v. Delima, 2 Call. 368; Winston v. Whitlocke, 5 Call. 435), except that before the statute it was not allowable (it would seem), to join a natural person with a personal representative, nor the representatives of several deceased persons, in the same proceeding. (Grymes v. Pendleton, 4 Call. 130, 134; Watkins v. Tate, 3 Call. 521.)

Where a motion is heard upon the merits, and in the opinion of the court is *not supported by the evidence*, the judgment should be that the plaintiff *take nothing by his motion*. (1 Rob. Pr. (1st ed.) 590; Webb v. McNeil, 3 Munf. 184; Ross v. Darby, 4 Munf. 428.)

As to *costs*, it is provided that upon *any motion*, (other than for a judgment for money,) the court may give or refuse costs at its discretion, unless it be otherwise provided. (V. C. 1873,

c. 181, § 4.) But we have seen that in general, in the exercise of this discretion, the costs will be awarded to the party substantially prevailing, (*Ante*, p. 789-'90.)

If judgment be given for the *plaintiff* on a motion, the defendant may file a bill of exceptions, setting forth the proofs submitted, and have the cause revised in an appellate court. And if upon examination of the proofs, it does not appear to the appellate court that the plaintiff is entitled to recover, the judgment is to be reversed. (1 Rob. Pr. (1st ed.) 591; Mayor, &c. v. Hunter, 2 Munf. 228; Stratton v. Mt. Assur. Soc., 6 Rand. 22; Grays v. Turnpike Co. 4 Rand. 578; *Ante*, p. 746.)

3<sup>d</sup>. The several *Prominent Instances of Motions* allowed by Law.

It must suffice to enumerate the most prominent instances of motions allowed by law. and to refer to the statutes relating thereto, and some of the authorities which illustrate the statutory provisions;

W. C.

1<sup>o</sup>. Motion on *Forthcoming Bonds*.

See V. C. 1873, c. 185, § 1, 2, 3 & seq., 8 & seq.; Id. c. 163, § 4; Id. c. 49, § 43; 1 Rob. Pr. (1st ed.) 591 & seq; Bart. Pr. 333 & seq.

The language of the statute, that the officer *may take* a forthcoming or delivery bond, gives no discretion to the officer. He *must* take it if offered. (Dwarr. Stats. (Potter), 220, & n (27); Supervisors v. U. States, 4 Wal. 446; City of Galena v. Amy, 5 Wal. 709; Garland v. Lynch, 1 Rob. 559.)

The *tenor* of the bond must correspond with the statute in all particulars. See 1 Rob. Pr. (1st ed.) 592; Wood v. Davis, 1 Wash. 70; Irvin v. Eldridge, 1 Wash. 161; Hubbard v. Taylor, 1 Wash. 259; Downman v. Chinn, 2 Wash. 189; Wilkinson v. McLochlin, 1 Call. 49; Scott v. Hornsby, 1 Call. 43, &c.; Winston v. Comm'th, 2 Call. 294 & seq; Bartley v. Yates, 2 H. & M. 398; Glascock v. Dawson, 1 Munf. 606 & seq; Bronaugh v. Freeman, 2 Munf. 266; Beale v. Wilson, 4 Munf. 380; Harrison v. Tiernans, 4 Rand. 177; Harpers v. Patton, 1 Leigh, 312 & seq; Meze v. Howver, 1 Leigh, 442; Turnbull v. Clairborne, 3 Leigh, 393 & seq; Hairston v. Woods, 9 Leigh, 309 & seq; Spencer v. Pilcher, 10 Leigh, 492 & seq.

As to the *form and tenor of the condition*, See 1 Rob. Pr. (1st ed.); Hubbard v. Taylor, 1 Wash. 259; Jett v. Walker, 1 Rand 212, *note*; Downman v. Downman, 2 Wash. 189; Bell v. Marr, 1 Call. 47; Wilkinson v. McLochlin, 1 Call. 49; Osbourne v. Crawley, 1 Va. Cas. 113; Winston v. Comm'th, 2 Call. 290; Harpers v. Patton, 1 Leigh. 306; Lewis v. Thompson, 2 H. & M. 100; Bronaugh v. Freeman, 2 Munf. 266; Bartley v. Yates, 2 H. & M. 398; Wood v. Davis, 1

Wash. 69; Irvin v. Eldridge, 1 Wash. 161; Ballard v. Whitlock, 18 Grat. 235.

In respect to the *forfeiture of the bond*, and the *consequences* thereof, see 1 Rob. Pr. (1st ed.) 595 & seq; Bernard v. Scott, 3 Rand. 522; McKinster v. Garrott, 3 Rand. 554; Cole v. Fenwick, Gilm. 134; Pleasants v. Lewis, 1 Wash. 273; Wilson v. Stevenson, 2 Call. 213; Rucker v. Harrison, 6 Munf. 181; Eppes v. Colley, 2 Munf. 523; Nicolas v. Fletcher, 1 Wash. 330; Cooke v. Piles, 2 Munf. 153; Lusk v. Ramsay, 3 Munf. 454; Jones v. Myrick, 8 Grat. 179; Randolph v. Randolph, 3 Rand. 490; Taylor v. Dundass, 1 Wash. 92; Downman v. Downman, 2 Wash. 189; Garland v. Lynch, 1 Rob. 545; Lipscomb v. Davis, 4 Leigh, 303; Robinson v. Sherman, 2 Grat. 178; Leake v. Ferguson, 2 Grat. 419.

As to the *consequence of quashing a forthcoming bond* as faulty, see 1 Rob. Pr. (1st ed.) 597 & seq; V. C. 1873, c. 185, § 5; Jett v. Walker, 1 Rand. 211; Braggs v. Murray, 6 Munf. 32; Couch v. Miller, 2 Leigh, 545.

The bond, insufficient as a forthcoming bond, *may be good as a common law bond*. See 1 Rob. Pr. (1st ed.) 598; Booker v. Coutts, 1 Call. 243; Hewlett v. Chamberlayne, 1 Wash. 367; Beale v. Downman, 1 Call. 249; Johnstons v. Meriwether, 3 Call. 523.

As to the *award of execution on the bond*, see 1 Rob. Pr. (1st ed.) 548; Turnbull v. Claiborne, 3 Leigh, 392; Dix v. Evans, 3 Munf. 308; Wilson v. Stevenson, 2 Call. 213; Glassel v. Delima, 2 Call. 368; Glascock v. Dawson, 1 Munf. 605; Bronaugh v. Freeman, 2 Munf. 266; Osborne v. Crawley, 1 Va. Cas. 113; Burke v. Levy, 1 Rand. 1; McRae v. T. Pike Co. 3 Rand. 160; Harpers v. Patton, 1 Leigh, 306; Anderson v. Leitch, 1 Leigh, 462; Beale v. Wilson, 4 Munf. 380; Stanard v. Timberlake, 3 Leigh, 681; Garland v. Lynch, 1 Rob. 545; Wooten v. Bragg, 1 Grat. 1; Booth v. Kinsey, 8 Grat. 560; Ballard v. Whitlock, 18 Grat. 335; Goolsby v. Strother, 21 Grat. 107.

The *defence of set-off* is admissible, when the forthcoming bond is taken on a warrant of *distress for rent*. See Allen v. Hart, 18 Grat. 722.

2°. Motion of *Surety against Principal*.

See V. C. 1873, c. 143, § 6; 1 Rob. Pr. (1st ed.) 604 & seq; Bart. Pr. 341 & seq; Harrison v. Field, 2 Wash. 136; Graves v. Webb, 1 Call. 443; Eppes v. Randolph, 2 Call. 125; Royster v. Leake, 2 Munf. 280; Randolph v. Randolph, 3 Rand. 490; Bacchus v. Gee, 2 Leigh, 68; Ayres v. Lewellin, 3 Leigh, 609; Butterworth v. Ellis, 6 Leigh, 106; Powell v. White, 11 Leigh, 309; Curd v. Miller, 7 Grat. 185; Stephenson v. Taverners, 9 Grat. 398; Hunter

v. Lawrence, 11 Grat. 111; Wm. and Mary Col. v. Powell, 12 Grat. 372; Harnsbarger v. Geiger, 3 Grat. 144, 147-'8; Humphrey v. Hitt, 6 Grat. 509; Devers v. Ross, 10 Grat. 252; Harnsbarger v. Kinney, 13 Grat. 511; Mills v. Central Savings Bank, 16 Grat. 97; Kendrick v. Forney, 22 Grat. 748; Harrison v. Price, 25 Grat. 568; Benton v. Slaughter, 26 Grat. 923; Adams v. Logan, 27 Grat. 201; Barger v. Buckland, 28 Grat. 850.

3°. Motion of *Surety against Co-surety*.

See V. C. 1873, 143, § 8; Harrison v. Lane, 5 Leigh, 414; Perrins v. Ragland, 5 Leigh, 552; Preston v. Preston, 4 Grat. 88; Wayland v. Tucker, 4 Grat. 267; Booth v. Kinsey, 8 Grat. 571, 576; Tarr v. Ravenscroft, 12 Grat. 652.

4°. Motion of *Bail against Principal*.

See V. C. 1873, c. 143, § 6; Levy v. Arnsthall, 10 Grat. 641; *Supra*, 2°.

5°. Motion of *Corporations against Delinquent Shareholders*.

See 1 Rob. Pr. (1st ed.) 607; V. C. 1873, c. 57, § 23, 25; 1 Insts. Com. & Stat. Law, 531; Graves v. T. Pike Co. 4 Rand. 683-'4; Bowyer v. T. Pike Co. 9 Grat. 109; 1 Insts. Com. & Stat. Law, 562-'3.

6°. Motion of *Client against Attorney at Law*.

See V. C. 1873, c. 160, § 10; 1 Rob. Pr. (1st ed.) 608; *Ante*, p. 174-'75; Taylor v. Armistead, 3 Call. 200; Gathright v. Marshall, 1 H. & M. 427; Pidgeon v. Williams, 21 Grat. 254.

7°. Motions *against Officers for Delinquency*.

The motions against officers, in which private individuals or corporations are interested are, (1), For failure to make a return upon any process, or for making a false return, (V. C. 1873, c. 49 § 27); (2), For the continuance of such failure, (V. C. 1873, c. 49, § 28); and (3), For failing to pay money collected under any order, warrant or process. (V. C. 1873, c. 49, § 45; Bart. Pr. 345 & seq.)

See McDowell v. Burwell, 4 Rand. 321; Wadsworth v. Miller, 4 Grat. 99; Stone v. Wilson, 10 Grat. 529; Bullock v. Goodall, 3 Call. 44; Tyree v. Donnally, 9 Grat. 67; V. C. 1873, c. 183, § 37; Goss v. Southall, 23 Grat. 832; Chapman v. Chevis, 9 Leigh, 297; Scott v. Tankersley, 10 Leigh 586; O'Bannon v. Saunders, 24 Grat. 138; Lee Co. Justices v. Fulkerson, 21 Grat. 182; Supervisors v. Dunn, 27 Grat. 608.

8°. Motion of *Sheriff against his Deputy*.

See V. C. 1873, c. 49, § 46 to 48; 1 Rob. Pr. (1st ed.) 616 & seq; Asberry v. Calloway, 1 Wash. 72; Drew v. Anderson, 1 Call. 51; Shelton v. Ward, 1 Call. 538; Stowers v. Smith, 5 Munf. 401; Harrison v. Lane, 4 Munf. 238; Jacobs v. Hill, 2 Leigh, 393; Fletcher v. Chapman, 2 Leigh,

567; V. C. 1873, c. 49, § 47; Weaver v. Skinker, 4 Grat. 160; Scott v. Tankersley, 10 Leigh, 581; McDaniel v. Brown, 8 Leigh, 218; Lee County Justices v. Fulkerson, 21 Grat. 182.

9<sup>c</sup>. Motion on any Bond taken by an Officer, or given by any Sheriff, Sergeant, or Constable.

See V. C. 1873, c. 163, § 5; Sangster v. Commonwealth, 17 Grat. 124, 180 & seq; Mosby v. Mosby, 9 Grat. 589, 602 & seq; White v. Johnson, 1 Wash. 159; James v. McCubbin, 2 Call. 273; Moore v. Downey, 3 H. & M. 127.

10<sup>c</sup>. Motion for Money due on any Contract.

See V. C. 1873, c. 163, § 6, 7; *Ante*, p. 523.

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## DIVISION VI.

### THE PURSUIT OF REMEDIES BY SUIT IN EQUITY.

#### VI. The Pursuit of Remedies by Suit in Equity.

Suits in equity include an immense number and variety of subjects—all of *civil*, and none, in modern times, of *criminal* jurisdiction. And consequently a judicature dealing with topics so multifarious must be expected to display in its proceedings more pliancy and less rigorous adherence to forms than we have seen to prevail in the proceedings in actions at common law. In Virginia, however, common law and equity proceedings have been, by statute, more and more assimilated, until, whilst notable differences still exist between them, yet the student will find that the knowledge he has attained touching the conduct of actions at common law, will render it easy to acquaint himself with proceedings in equity.

Equity is, in England, a branch of the jurisdiction of the court of chancery, and is there denominated its *extraordinary jurisdiction*, for a reason which will be presently apparent. In the United States, *chancery* and *equity* are often treated as synonymous, and without much practical inconvenience. But as some confusion of thought is liable to grow out of the mixed use of the terms, the student is advised to retain in his mind the distinction between them, as presently to be expounded.

The whole subject upon which we are about to enter may be discussed under the two heads of (1), The nature, origin, and organization of the courts of chancery in England and in Virginia; and (2), The proceedings in the extraordinary court of chancery, or court of equity.

W. C.

## CHAPTER I.

THE NATURE, ORIGIN, AND ORGANIZATION OF THE COURTS OF  
CHANCERY IN ENGLAND AND IN VIRGINIA.1<sup>a</sup>. The Nature, Origin, and Organization of the Courts of Chancery in England and in Virginia.

It is proposed to set forth, (1), The nature and origin of the courts of chancery; and (2), Their organization;

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1<sup>b</sup>. The nature and origin of the courts of chancery in England and in Virginia.

The chief judge of the court of chancery in England has always been the Lord High Chancellor. This *office* has existed from the most remote antiquity of the law. The almost fabulous British king Arthur is said to have appointed a chancellor. The Anglo-Saxon monarchs, from Ethelbert (king of Kent, and chief of the Heptarchy, from A. D. 568 to 616,) downwards, certainly had such an officer, although we may not therefore conclude, as some have done, that the chancery *dispensed justice* as an ordinary tribunal, in the reign of King Alfred. The *office* of chancellor did indeed then exist, but centuries elapsed before the chancery assumed the functions of a court. (1 Campb. Chan'rs, 26.)

For several centuries past, however, the chancellor has held a very important court, known as the *court of chancery*, which consists of two distinct tribunals, the one *ordinary*, being a court of *common law*; the other *extraordinary*, being a court of *equity*;

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1<sup>c</sup>. The Ordinary Court of Chancery in England.

The ordinary court of chancery (the *court of common law*), is a court of record, and is pronounced by Blackstone to be much more ancient than the extraordinary court, or court of equity (3 Bl. Com. 47), although Lord Campbell expresses the opinion that they originated at the same time. (1 Campb. Chan'rs, 30; *Ante* p. 184.)

The jurisdiction of the ordinary court is to hold plea upon writs of *scire facias* to repeal and cancel the king's letters patent evidencing grants of the crown, when they are made against law, or upon untrue suggestions; and also to hold plea of *petitions of right*, *monstrans de droit*, traverses of office, and the like, where the crown has, upon misinformation, invaded the subject's rights of property.

The ordinary or legal court of chancery is also the *officina justitiæ*, out of which issue all remedial writs which pass under the great seal, as well as all commissions of bankruptcy, idiocy, lunacy, and the like; the court being always open to

the subject to demand *ex debito justitiæ*, any writ that his occasions call for. (3 Bl. Com. 48; 3 St. Com. 408 & seq; Bac. Abr. Court of Chancery (A) and (B); *Ante*, p. 184.)

2<sup>e</sup>. The Extraordinary Court of Chancery, or *Court of Equity*, in England and in Virginia.

The equitable or extraordinary branch of the court of chancery, whensoever or howsoever the jurisdiction originated, has for many ages possessed more judicial consequence than any other court in the kingdom; and in the jurisprudence of Virginia, and generally of these States, equity cognizance holds a place not less important than in England, as will be apparent from the enumeration presently to be made of its more prominent subjects. Meanwhile, as we are to look at it as it exists with us, it will tend to clearness of apprehension to denominate it the *court of equity*, instead of the *extraordinary court of chancery*. Let us examine, (1), The causes which gave rise to the equitable jurisdiction of the court of chancery in England; (2), The modern criterion of equitable jurisdiction in England and in Virginia; (3), The technical meaning of equity in England and in the United States; and (4), The functions of the courts of equity in England and in Virginia;

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1<sup>d</sup>. The Causes which gave Rise to the Equitable Jurisdiction of the Court of Chancery in England.

The causes which gave rise to the equitable jurisdiction of the court of chancery may be summed up thus: (1), The unreasonable rigor or remissness of the clerks in chancery in omitting to devise new writs, and the illiberality of the judges in declining to extend the remedial effect of the old; (2), The power and influence of the great barons in perverting the administration of justice; (3), The general inadequacy of many of the remedies used in the courts of law; and (4), The introduction of uses. (*Ante*, p. 185);

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1<sup>e</sup>. The unreasonable *Rigor or Remissness of the Clerks* in Chancery in omitting to devise new Writs, and the *Illiberality of the Judges* in declining to extend the remedial effect of existing Writs to new Cases.

It was the duty of the clerks in chancery, (afterwards styled *Masters*) to *hear and examine* the complaints of those who sought redress in the king's courts, and to furnish them with the appropriate writs; and although they could not at common law alter the old writs recorded of long time in the "*Register of Writs*," nor add new ones, they were understood to possess the power to adapt the existing forms to particular cases which were only new *in the instance*, and not *in principle*; it being apparently



agreed that parliament alone had power to devise writs *new in principle*. (1 Spence Eq. Jur. 238-'9; 2 Reeves' Hist. E. L. 203; Pref. 9 Co. p. xxviii.) The clerks being remiss, however, in performing this function, their diligence was quickened by the statute 13 Edw. I, c. 24, whereby it is provided that "Whensoever from henceforth in one case a writ shall be found in the chancery, (*i. e.* in the *Register of Writs*, kept there,) and in a like case falling under the same right, and requiring like remedy, no precedent of a writ can be produced, the clerks in chancery shall agree in forming a new one; and if they cannot agree, it shall be adjourned to the next parliament, where a writ shall be framed by consent of the learned in the law, lest it happen for the future, that the court of our lord the king be deficient in doing justice to the suitors."

Numerous writs were accordingly devised adapted to the nature of the case, some *in tort*, and others *in contract*, taking the name of writs of *trespass on the case*, (*transgressionis super casum*.) And this provision, with some pains-taking on the part of the clerks or masters in chancery, might have effectually answered in some important particulars the purposes of a court of equity. And on the other hand, even though the clerks had disregarded, as they did, the policy of the statute above cited, had the judges exercised a due liberality in extending the remedial effects of the existing writs, there would have been comparatively small occasion to resort to any extraordinary jurisdiction. (3 Bl. Com. 50, 51.)

But both clerks and judges were wanting in a just appreciation of their duty, and suitors finding themselves denied redress in any of the king's courts, brought their grievances directly to the king, and in process of time all such cases of residuary or unappropriated jurisdiction fell under the extraordinary authority of the court of chancery.

2°. The *Power and Influence of the great Barons* in perverting the Administration of Justice.

There is reason to believe, that amongst the earliest applications for special relief referred to the chancellor, were complaints from those who suffered by direct violence, and the *combination and confederacy* of powerful lords, overawing, resisting or perverting the ordinary administration of justice through the courts, so that no redress could be obtained, except by the direct interposition of the royal authority. (1 Spence Eq. Jur. 342-'3; 1 Campb. Chan'rs, 32.)

3°. The *general Inadequacy* in many cases of the only Remedies Obtainable in a Court of Law.

Thus, for example, where the parties were interested

together, as in the case of partners, touching affairs of the partnership; where mutual accounts were intricate; where a suppression of documents had occurred; where the specific enforcement of a collateral agreement was necessary to the justice of the case; or where there was urgent need to prevent irremediable damage to property or to health; in these and numerous other cases, a remedy at law was either wholly wanting, or that which was allowed was inadequate. (1 Campb. Chan'rs, 32.)

4°. The Introduction of *Uses and Trusts* into England.

Uses and trusts were introduced into England in the latter part of the reign of Edward III, about A. D. 1370. The idea was derived from the *fidei commissum* of the Roman law, and was resorted to by the ecclesiastics in order to evade the statutes of *mortmain*. As the common law had not conceived the possibility of separating the *use* from the *legal title*, the statutes of mortmain had not, down to that time, contemplated the acquisition by ecclesiastical corporations and persons of any such interest as a *use*, and consequently had not prohibited it. The court of chancery, however, held uses and trusts to be binding *in conscience*, though totally discountenanced by the common law; and as many advantages were found to be attendant upon such interests, when held by natural persons and laymen, as well as by corporations and ecclesiastics, in a short time an immense proportion of the lands of England were conveyed to trustees *in trust for*, or *or to the use of* their real proprietors. And although about twenty years afterwards, by the Stat. 15 Ric. II, c. 5, the ecclesiastics,—the inventors in England of this new manner of interest,—were deprived of the benefit of their daring experiment, by extending the *mortmain* policy to uses, the people at large became more and more enamored of them, and ere many years had elapsed, the court of chancery, in the extraordinary or equitable branch of its jurisdiction, found itself possessed, through the medium of uses and trusts, of the cognizance of a great part of the property of the realm. (*Ante*, Vol. II, p. 177 & seq, 726 & seq; 3 Bl. Com. 51; 1 Spence's Eq. Jurisd. 442 & seq.)

Whenever, from these or other causes, the subject was denied complete redress for his wrongs in the courts of law, he carried his grievances, as intimated above, to the foot of the throne, where they were heard and disposed of before the king himself, either in the great council of the realm, that is, the parliament, or in his lesser and more select council, of which the chancellor was, for the most part, a chief member; and being the most learned, and at the same time the most permanent, he by degrees monop-

lized the sole adjudication of all such extraordinary causes. (1 Campb. Chan'rs, 30 & seq; 1 Spence Eq. Jurisd. 328 & seq.)

2<sup>d</sup>. The *Modern Criterion of Equitable Jurisdiction* in England and in Virginia.

In modern times, a criterion of equitable jurisdiction is adopted, having a striking analogy to its origin, namely, the *insufficiency, for any cause, of the remedies administered in the law courts*; for it may be assumed as practically a universal rule, that if there is *a right*, and *no remedy at law*, or *an obscure, doubtful, or inadequate one* to enforce it, a proper remedy, *as far as the circumstances admit*, will be afforded in equity. (2 Rob. Pr. (1st ed.) 1; 1 Stor. Eq. § 33; 1 Spence Eq. Jurisd. 430; Hargr. Law Tracts, 444; Mitf. Eq. Pl. 104-'5.) Let the qualification be noted, *as far as the circumstances admit*; for there are cases of rights where the remedy at law is inadequate, and where yet equity will decline to interpose, because from the nature of the case it can afford no effectual relief. Thus, in case of the violation of a contract to render a *personal service*, the effective performance of which depends peculiarly on knowledge, skill, or taste, such as authorship, acting as a player, singing, dancing, and the like, damages (the only redress which the common law gives) are often inadequate, but a court of equity will take no cognizance of the case, in order to compel a specific performance of the agreement, because in the nature of things it is impossible that it should do so effectively. In some cases, indeed, equity has interposed by injunction, *to prevent* the delinquent from engaging, contrary to the terms of the contract, in the service of a rival establishment; but even that redress is afforded, it is believed, only on the ground that the contract amounts to a *partnership*, between the parties to it, and is denied when there is no partnership. (Clarke v. Price, 2 Wils. Ch. R. 157; Kemble v. Kean, 6 Sim. (9 Eng Ch. R.) 333; Kemberly v. Jennings, Id. 340; Morris v. Colman, 18 Ves. 437.)

3<sup>d</sup>. The *Technical Meaning of Equity* in England and in the United States.

The term *equity*, in England and in Virginia, and as employed in most of the American States, has a signification very different from the same term in the general sense of Grotius, namely, "*the correction of that wherein the law, by reason of its universality, is deficient.*" Let us observe, therefore, (1), The definition of equity in this technical sense; and (2), The grounds of discrimination between courts of law and courts of equity;

W. C.

1<sup>e</sup>. The *Definition of Technical Equity*.

The English and American technical equity is well defined by Mr. J. Story, to be "that portion of remedial justice which is exclusively administered by a court of equity, as contradistinguished from that portion of remedial justice which is exclusively administered by a court of common law." (1 Stor. Eq. § 25.) But equity does not undertake, as has been sometimes thought, either to abate the rigor of the common law, or to supply the defects of positive legislation, and it holds itself as much subject to be controlled by established rules and precedents as do the courts of law. (3 Bl. Com. 430; 1 Stor. Eq. § 12, 14, &c., 19 & seq.)

2°. The *Grounds of Discrimination* between Courts of Common Law and Courts of Equity.

Mr. Justice Story further discriminates between courts of equity and courts of common law, by reference to the particulars following, (1 Stor. Eq. § 26 & seq.); namely :

(1), The different *natures of the rights* which they are designed to recognize and protect.

Thus equity takes notice of and protects especially trusts and equitable estates generally ; injuries arising by mistake, accident or fraud ; many cases of penalties and forfeitures, in order to relieve against them ; and cases of imposition and unconscionable bargains, &c. ; whilst a court of common law, in some of these cases, as notably in the case of trusts and equitable estates, does not recognize the right, and in all of them affords either no protection thereto, or a very inadequate one. (1 Stor. Eq. § 29) ;

(2), The different *natures of the remedies* which they apply.

Thus, the courts of equity enforce in certain cases the *specific performance* of contracts where damages for their violation would constitute an inadequate redress ; grant *injunctions* to prevent the perpetration or continuance of injuries which would, from their nature, be incapable of reparation in damages ; and otherwise aim to afford *specific redress* precisely adapted to the nature of the case ; whilst courts of law aim to give specific redress only in a few cases which have been heretofore mentioned, (*Ante*, p. 333) and in general, have no power to compel the specific execution of agreements, or to prevent the commission of a wrong, however irreparable. (1 Stor. Eq. § 30) ; and

(3), The different *natures of the forms and modes of procedure* which they adopt.

Thus equity determines contested facts *by the court*, instead of by a jury ; derives proofs from *discoveries on oath* made by the parties, as well as from the evidence of disinterested witnesses, (although, in this particular the courts of law

are, by statute in Virginia, closely assimilated to the equity courts, V. C. 1873. c. 172, § 21 to 24; settles accounts, and makes extrinsic inquiries through the agency of a *master commissioner*, &c. (1 Stor. Eq. § 31.)

4<sup>d</sup>. The *Functions of the Courts of Equity* in England and in Virginia.

The functions of the courts of equity, that is, the jurisdiction exercised by them, have been subjected to various classifications by different writers, all of them founded more or less closely upon a comparison with the authority and functions of the common law courts.

Perhaps the subject may be more satisfactorily presented by adverting to (1), The classification proposed by Lord Redesdale; (2), That proposed by Mr. Fonblanque, Mr. Justice Story, and others; and (3), That proposed by Mr. Spence;  
W. C.

1<sup>c</sup>. The Classification of the Subjects of Equity-Jurisdiction proposed by Lord Redesdale.

Having stated the *general objects* of the jurisdiction of a court of equity, (Mitf. Eq. Pl. 3 & seq), Lord Redesdale observes, that it may be thence collected that the jurisdiction, when it assumes a *power of decision*, is to be exercised in the cases following, (Mitf. Eq. Pl. 103 & seq):

1, Where the principles of law by which the ordinary courts are guided *give a right*, but the *powers* of those courts are not sufficient to afford a *complete remedy*, or their modes of proceeding are *inadequate* to the purpose. (Mitf. Eq. Pl. 104 & seq);

2, Where the courts of ordinary jurisdiction are made *instruments of injustice*, as in cases of *fraud or accident*. (Mitf. Eq. Pl. 116 & seq);

3, Where the principles of law by which the ordinary courts are guided *give no right*, but upon the principles of universal justice the interference of the judicial power is necessary to prevent a wrong, and the positive law is silent, as in *matters of trust and confidence*. (Mitf. Eq. Pl. 120.)

From the same enumeration of the general objects of equity cognizance, the author proceeds to say that it may be also collected that the courts of equity, *without deciding upon the rights of the parties*, administer to the ends of justice by assuming a jurisdiction;

4, To *remove impediments to the fair decision* of a question in other courts, as by prohibiting *satisfied trust-terms* for years from being used to repel an action of ejectment brought for the land by the real owner. (Mitf. Eq. Pl. 104, 121; 2 Insts. Com. & Stat. Law, 144, 199 & seq);

5, To *provide for the safety of property in dispute*

pending a litigation, as by an injunction to prohibit waste, the appointment of a receiver, &c. (Mitf. Eq. Pl. 104, 122);

6, To *restrain the assertion of doubtful rights* in a manner productive of irreparable damage, as by injunction to prohibit the alleged invasion of copy-rights and patent-rights. (Mitf. Eq. Pl. 104, 123 & seq);

7, To *prevent injury to a third person* by the doubtful title of others, as by interpleader, &c. (Mitf. Eq. Pl. 104, 125);

8, To *put a bound to vexatious and oppressive litigation*, and *prevent multiplicity of suits*, as where one general legal right is claimed against many distinct persons, for instance, a right of fishery throughout the course of a considerable river, in opposition to the riparian proprietors, and a bill is filed to establish the right *against all*. (Mitf. Eq. Pl. 104, 127 & seq.)

And farther, that courts of equity, without pronouncing any judgment which may affect the rights of parties, extend their jurisdiction.

9, To *compel a discovery* which may assist the decisions of other courts. (Mitf. Eq. Pl. 104, 130); and

10, To *preserve testimony* when in danger of being lost before the matter to which it relates can be made the subject of judicial investigation, for which easy and cheap provision is now made *by statute* with us. (Mitf. Eq. Pl. 104, 130; V. C 1873, c. 172, § 40.)

2°. The Classification of the Subjects of Equity-Jurisdiction *proposed by Mr. Fonblanque, Mr. Justice Story, and others.*

This classification, founded on a comparison of the powers of equity with those of the courts of common law, arranges the subjects of the jurisdiction of the courts of equity under the respective heads (having reference to the courts of law), of, (1), Concurrent; (2), Exclusive; and (3), Auxiliary, or Supplemental. (Fonbl. B. I, c. I, § 3, n (f), and Am. note \*; 1 Stor. Eq. § 75 & seq; 2 Do. § 960 & seq, § 1480, & seq; Coop. Eq. Pl. Introd. p. xxvi. & seq; W. C.

1°. The Subjects embraced by the *Concurrent Jurisdiction* of the Courts of Equity.

The jurisdiction of the courts of equity is *concurrent* more or less with that of the courts of law in a great number of cases, such as (1), Accident; (2), Mistake; (3), Fraud; (4), Account; (5), Administration and legacies; (6), Dower and partition; (7), Confusion of boundaries; (8), Marshalling of securities; (9), Partnership; (10), Cancellation of writings; (11), Specific performance of agreements; (12), Interpleader, bills *quia timet* and bills

of peace; and (13), Injunctions. (Fonbl. Eq. B. I, c. I, § 3, n (f), and Am. note \*; 1 Stor. Eq. § 75 & seq.)

2<sup>f</sup>. The Subjects embraced by the *Exclusive Jurisdiction* of the Courts of Equity.

The jurisdiction of the courts of equity is *exclusive* of that of the courts of law in the instances following, amongst others, namely: (1), Trusts; (2), Mortgages; (3), Assignments; (4), Election and satisfaction; (5), Penalties and forfeitures; (6), Infants, idiots and lunatics; (7), Separate property of married women; and (8), The setting aside of awards. (2 Stor. Eq. § 960 & seq.)

3<sup>f</sup>. The Subjects embraced by the *Auxiliary Jurisdiction* of the Courts of Equity.

The jurisdiction of the courts of equity is reckoned by Mr. Justice Story to be auxiliary or supplemental to that of the courts of law in but two instances, although several of the cases mentioned in the foregoing classes might, with propriety, be placed under this head. The cases referred hither, however, by the learned writer just named, are (1), Bills of discovery; and (2), Bills to perpetuate testimony. (2 Stor. Eq. § 1480 & seq.)

3<sup>o</sup>. The Classification of the Subjects of Equity-Jurisdiction *proposed by Mr. Spence*.

Mr. Spence having cited from George Norburie's ingenious and interesting discourse upon "The Abuses and Remedies of Chancery," addressed to the Lord Keeper Williams, in the latter part of the reign of James I. (Hargr. Law Tr. 444), a passage tending to show that the true criterion, then and now, of equity-cognizance is the non-existence of an adequate and certain remedy at law, proceeds to found his classification of the subjects of equity jurisdiction upon the mode and extent in which the co-existing state of the law has been affected, as regards each separate class of cases on which the jurisdiction of the court of chancery has been exercised. (1 Spence Eq. Jurisd. 430.)

Taking thus the *extent and the mode* in which the legal title or interest of the parties is affected as the basis of the summary, the natural order seems to be to consider, in the first place, those cases in which the *most violent invasion* of the law has been effected, and then to arrange in subsequent classes those cases where the interference is less and less, until at length we come to the cases where the jurisdiction of equity is merely *assistant* to the courts of common law. The several classes, with their sub-divisions, will then be as follows:

W. C.

- 1<sup>st</sup>. Cases wherein a *Violent Invasion of the Law* has been Effected.

Mr. Spence regards the doctrines touching matters of *trust and confidence* as answering especially to this description, for through them the court has introduced a right of enjoyment of property distinct from the legal right, and has made the legal right subservient to this beneficial title to enjoyment, and regulated the exercise of both according to principles of its own. Under this head also, he ranges several cases which partake of the nature of matters of trust and confidence. (1 Spence Eq. Jurisd. 431-'2, 435 & seq.)

W. C.

- 1<sup>st</sup>. Matters of Trust and Confidence.

- 2<sup>nd</sup>. Administration of Dead Men's Estates.

- 3<sup>rd</sup>. Charities.

- 4<sup>th</sup>. Separate Estate of Married Women.

- 5<sup>th</sup>. Mortgages; and,

- 6<sup>th</sup>. Care of Infants, Idiots, and Lunatics.

- 2<sup>nd</sup>. Cases where the Court of Chancery exercises Jurisdiction *over the Legal Right itself*, by extinguishing, shifting or controlling it, *without introducing any co-existing equitable title*. (1 Spence Eq. Jurisd. 432, 621 & seq.)

- 1<sup>st</sup>. Cases of Fraud;

- 2<sup>nd</sup>. Accident;

- 3<sup>rd</sup>. Mistake, and Ignorance of *Fact*;

- 4<sup>th</sup>. Forfeitures and Penalties; and,

- 5<sup>th</sup>. Relief to Sureties; and other like cases of control of legal rights, on principles of Natural Justice.

- 3<sup>rd</sup>. Cases where Equity *enforces or extends* Legal Rights. (1 Spence Eq. Jurisd. 432-'3, 643 & seq); W. C.

- 1<sup>st</sup>. To make the *Remedy Effectual*, as in case of Partners and Executors.

- 2<sup>nd</sup>. To afford an *adequate and appropriate Remedy*, as in case of Specific Performance.

- 3<sup>rd</sup>. To afford a *convenient Remedy*, when the remedy at law is difficult or hazardous, as in matters of Account, Dower, Partition, Boundaries, &c.

- 4<sup>th</sup>. Cases of *Interference with the Law in a slighter Degree*, not by taking Jurisdiction, but by Regulating the *Mode of trying and determining Legal Rights*; as by *preventing Multiplicity of Suits*, or *Vexatious Litigation*, &c. (1 Spence's Eq. Jurisd. 433, 656 & seq.); W. C.

- 1<sup>st</sup>. To Establish a *General Right*, common to many;

- 2<sup>nd</sup>. To *Quiet Possession*; and

- 3<sup>rd</sup>. Case of *Interpleader*, &c.

- 5<sup>th</sup>. Cases where, when *the Law is Deficient*, the Court of Equity *enforces Obligations* between Parties standing in



*certain Relations, independently of Contract, on Principles of Natural Justice.* (1 Spence Eq. Jurisd. 433, 661, &c.; W. C.

- 1<sup>s</sup>. Contribution *between Sureties*;
- 2<sup>s</sup>. Apportionment of Rent between Partics; and
- 3<sup>s</sup>. Partnership Matters.
- 6<sup>t</sup>. Cases of the *Preventive and Protective Jurisdiction* of Equity. (1 Spence Eq. Jurisd. 434, 668 & seq); W. C.
- 1<sup>s</sup>. By Writ of *Injunction*; and
- 2<sup>s</sup>. By *Appointment of Receivers*.
- 7<sup>t</sup>. Cases where Equity *Exercises an Assistant Jurisdiction*. (1 Spence Eq. Jurisd. 434, 677 & seq); W. C.
- 1<sup>s</sup>. Discovery of Facts;
- 2<sup>s</sup>. Discovery and Production of Documents; and
- 3<sup>s</sup>. Perpetuation of Testimony.

This last classification by Mr. Spence, the writer, with not a little distrust of his judgment, conceives to be upon the whole preferable to either of the other two, chiefly because it seems to him to present the catalogue of the subjects of equity jurisdiction in the most logical order, and therefore to be the most easily retained by the memory, whilst it, at the same time, admits most readily of the due arrangement of other topics in their appropriate classes.

2<sup>b</sup>. The Organization of the Courts of Chancery in England and in Virginia: W. C.

1<sup>o</sup>. The Organization of the Court of Chancery in England.

Prior to the recent judicature acts, beginning with that of 1873, the judges of the court of chancery in England, which formerly were but *two* in number, had been multiplied to *seven*, namely:

- The Lord Chancellor;
- Two Lords Justices of Appeal;
- The Master of the Rolls; and
- Three Vice-Chancellors.

The Vice-Chancellors and the Master of the Rolls held each a separate court of his own, from which an appeal lay to the *court of appeal in chancery*, composed of the Lord Chancellor, and the two Lords Justices, and thence to the House of Lords.

The judicature acts of 1873, and of subsequent years down to 1877, have wrought great changes in the organization of the chancery system of England, and in its mode of administration. We have formerly seen somewhat of the present arrangement of the English courts under these acts, (*Ante*, p. 199 & seq.) which, it will be remembered, contemplated, (1), The Queen's High Court of Justice; (2), The Queen's Court of Appeal; and (3), The House of Lords.

The queen's high court of justice, it will be also remembered, we found to consist of *five divisions*, namely: (1), The chancery division; (2), The queen's bench division; (3), The common pleas division; (4), The exchequer division; and (5), The probate, divorce, and admiralty division. But all these courts, as well as the court of appeal, are directed in *every civil cause or matter*, to administer law and equity, essentially *without discrimination*, and where there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the *rules of equity shall prevail*. (Lely & Foulkes, Judic. Acts, 17 & seq., 25.)

Every one of the above courts, therefore, and each of the judges thereof, exercises chancery jurisdiction, to an equal extent, it seems, with the chancery division itself; but perhaps, it may be expedient to recall to the student's memory that the *chancery division* consists of the members following, (*Ante*, p. 200,) namely:

- 1, The Lord Chancellor as *President*;
  - 2, The Master of the Rolls;
  - 3, Three Vice-Chancellors, or such of them as shall not be appointed ordinary judges of the court of appeal;
  - 4, A new *puisné* judge, under an act of April, 1877.
- 2°. The Organization of the Courts of Chancery in *Virginia*.

Down to 1873, the courts of chancery of original jurisdiction in Virginia, were the county, corporation and circuit courts, but by act of 2nd April, 1873, the statute, older than the commonwealth by more than a century, which conferred upon the *county courts* jurisdiction to hear and determine "all cases at law and in *chancery*," within the respective counties, was repealed. (V. C. 1873, c. 154, § 7, & n \*; Acts 1872-'3, p. 383, c. 395, § 9; Acts 1869-'70, p. 35, c. 38, § 3.) From that time, therefore, the courts of chancery have been only the corporation and circuit courts. (*Ante*, p. 216, 222, 227-'8); whose organization respectively has been already set forth. (*Ante*, p. 219, 226-'7.)

## CHAPTER II.

### OF THE PROCEEDINGS IN THE EXTRAORDINARY COURT OF CHANCERY, OR COURT OF EQUITY.

- 2°. The Proceedings in the Extraordinary Court of Chancery, or Court of Equity.

It will be expedient in treating this subject to present, (1), An abstract or outline of the proceedings; and (2), An exhibit of them in detail, in connexion with a supposed case. And it

is hoped that the student will not fail to note in the abstract, what will be still more apparent when he comes to the detail, how close is the analogy with us between the proceedings in equity, and the proceedings in an action at law; with many differences it is true, but with a similitude so strong in the main as to divest this division of all serious embarrassments to those who have attentively studied the exposition of the latter subject made in the former part of this volume. (*Ante*, p. 517 & seq); W. C.

1<sup>b</sup>. An Abstract or Outline of the Proceedings in the courts of Equity; W. C.

1<sup>c</sup>. The Process to convene the Parties Defendant; W. C.

1<sup>d</sup>. The *Subpœna*, or Summons.

2<sup>d</sup>. The Order of Publication.

2<sup>e</sup>. Orders or Rules, with a view to mature the cause for hearing and Decree.

3<sup>e</sup>. The Pleadings; W. C.

1<sup>d</sup>. The Bill of Complaint.

2<sup>d</sup>. The Defence by the Defendant; W. C.

1<sup>e</sup>. Demurrer to the Bill.

2<sup>e</sup>. Plea to some specific Matter or Matters in the Bill.

3<sup>e</sup>. Disclaimer by Defendant of any Interest in the Subject-matter of the Suit.

4<sup>e</sup>. Answer in full to the Averments and Interrogatories contained in the Bill.

3<sup>d</sup>. General Replication by Plaintiff to Defendant's Defence, including Joinder in Demurrer.

4<sup>d</sup>. Amended Bill by Plaintiff, where a General Replication is not Sufficient.

4<sup>e</sup>. The Decree.

5<sup>e</sup>. The Circumstances attending the Carrying out of a Decree.

6<sup>e</sup>. Re-hearings, and Bills of Review; W. C.

1<sup>d</sup>. Re-hearing of *Interlocutory* Decrees.

2<sup>d</sup>. Bills of Review of *Final* Decrees.

7<sup>e</sup>. Proceedings by way of Appeal.

2<sup>b</sup>. The Proceedings in Detail, in Causes in Equity in Virginia.

The discussion of the proceedings in causes in equity may perhaps be most satisfactorily prosecuted by, (1), Stating a supposed case; and (2), Pursuing the proceedings therein from beginning to end;

W. C.

1<sup>c</sup>. The Statement of the Supposed Case.

Thomas Hart, on the 8th September, 1868, duly executed his last will, whereby he appointed no executor, and made no disposition of his property, except to charge his whole estate with the payment of his debts, and subject thereto to bequeath his four blooded mares, of the value of \$6,000, to his son James, in addition to his equal share in the residue of

what the testator should die seised and possessed of. And on the 10th May, 1870, Thomas Hart died, leaving a large real and personal estate, and *surviving* him a widow, Jane, and four children, John, James, Mary, wife of Henry Wells, and Anne, an infant of twelve years of age.

John resides in Missouri, the rest in Virginia, in the county of A. The widow, Jane, qualified as Thomas Hart's administratrix, with the will annexed; but has never settled her accounts of administration. No assignment of dower has been made to the widow, nor has there been any partition of the lands, nor delivery to James of his specific legacy, nor distribution of the personalty.

The family (except John) have all lived together in the mansion-house belonging to Thomas Hart, and the valuable and productive farm attached thereto has been managed for the common benefit, by James Hart and his mother in conjunction, she being regarded as the head of the establishment. Until recently the harmony of the household has been undisturbed, but of late differences have occurred between James and his mother, and the children generally are dissatisfied that the estate has not been divided. Mrs. Hart has expressed her purpose, with the view, as she alleges, to pay some pressing debts of her husband's estate, to sell the blooded mares bequeathed to James Hart, and to that end has been negotiating with several parties, and, amongst others, with George Perry, who avows that if he buys them, he will remove them immediately to California. James insists that his father's estate owes no debts of consequence, but that the debts referred to by his mother, either were at first, or by her *devastavit* of the assets of the estate committed to her, have become her own *individual debts*.

James Hart wants a remedy.

2°. The Proceedings, from beginning to end, in a suit in Equity founded on the foregoing case.

As we have already seen from the abstract set forth above, the several steps in the proceedings include, (1), The process to convene the parties defendant; (2), The rules or orders with a view to mature the cause for hearing or decree; (3), The pleadings; (4), The decree; (5), The modes of carrying the decree into effect; (6), The rehearing of interlocutory decrees; (7), Bill of review of a final decree; and (8), Proceedings by way of appeal;

W. C.

#### SECTION I.

##### *The Process to Convene the Parties Defendant.*

1<sup>d</sup>. The Process to Convene the Parties Defendant.

Whilst in the common law courts the process, as was for-

merly explained, (*Ante*, p. 517 & seq.) is various, according to the character of the action and the exigency of the case, in the court of equity it is uniformly a *subpœna*, or by statute in Virginia, a *summons*, (V. C. 1873, c. 166, § 5,) which essentially is the same thing. And this summons is with us aided and supplemented in the case of defendants not resident in the commonwealth, by an *order of publication*. Let us note therefore, (1), The *subpœna* or summons; and (2), The doctrine applicable to any order of publication;  
W. C.

1\*. The *Subpœna* or Summons in Chancery.

The *subpœna* was invented, or rather adapted to its present purpose, by John de Waltham, master of the rolls and temporary keeper of the great seal during the absence of the chancellor abroad, in the reign of Richard II. He justified his innovation by what Blackstone not unjustly denominates a *strained interpretation* of the statute of 13 Edw. I, c. 24, whereby when a writ should be found in the register of writs, and in a like case *falling under the same right and requiring like remedy*, no precedent of a writ could be produced, the clerks in chancery were directed to frame a new one adapted to the nature of the complaint. (3 Bl. Com. 51-'2.) But in truth, notwithstanding John de Waltham has been extravagantly censured by some, and as extravagantly extolled by others for this his imputed invention, which consisted in merely adding to the form of summons which had been previously used the words, "And this he shall in no wise omit *under the penalty* (*subpœna*) of £100," it is matter of surprise that such importance was ever attached to it, or how it was supposed to have brought about so complete a revolution in equitable proceedings; for the penalty was not capable of being enforced, and if the party failed to appear, his default was treated and punished, as probably it had been before, as a *contempt of court*, and obedience coerced accordingly. (1 Spence Eq. Jurisd. 369-'70, & n (a); 3 Reeves' Hist. E. L. 192; 1 Campb. Chan'rs, 239, & n \*.)

There is no doubt that the equitable jurisdiction of the court of chancery was greatly enlarged during the unhappy reign of Richard II, by the then recent introduction of uses and trusts, and also by reason of the violent disorders which, pending the long minority of that prince, affected the whole realm, and almost suspended the administration of justice through the regular tribunals; and it is certain that the growth of that jurisdiction was regarded by the people of England with much displeasure and jealousy. The complaints and remonstrances of the house of commons, however, which were often reiterated, were based

on grounds far more substantial than de Waltham's verbal addition to the writ of summons. They were that persons were called into this court, not upon any *specific complaint*, but *quibusdam de certis causis*, without setting forth what those certain causes were; that persons also were required to answer as to their *franc-tenement*, (a sacred thing in the eyes of English proprietors), and to disclose their titles, which the commons denounced as being contrary to law; that the course of proceeding was not according to the common law, but *to the practice of the church*; and that the extraordinary process of the court was abused for purposes of extortion; which last objection may possibly have had relation to the *subpœna*, the commons being, or affecting to be, ignorant of the harmlessness of the threat contained in the penal clause. (1 Spence Eq. Jurisd. 344.)

The process of *summons* in suits in equity, just as in actions at law, is obtained (except where it is otherwise specially provided), from the clerk's office of the circuit or corporation (not county—V. C. 1873, c. 154, § 7 & note \*) court of any county or corporation:

(1), Wherein *any of the defendants* may reside;

See V. C. 1873, c. 165, § 1, (cl. i.)

(2), If a *Corporation* be a defendant, wherein its *principal office is*, or wherein its *mayor, rector, president, or other chief officer resides*. If the suit or action be to recover a loss under any *policy of insurance*, either upon property or upon life, the action or suit may be brought in the county or corporation wherein the *property insured was situated*, or the *person whose life was insured resided* at the date of the policy of insurance;

See V. C. 1873, c. 165, § 1, (cl. 2.)

(3), If it be to recover *land, or to subject it to a debt*, or be against a defendant *who resides without*, but has estate or debts due him within this State, wherein such *land, estate or debts, or any part thereof may be*;

See V. C. 1873, c. 165, § 1, (cl. 3): *Crutcher v. Crutcher*, 4 Munf. 457; *Randolph v. Tucker*, 11 Leigh, 655, 662; *Middleton v. Pinnell*, 2 Grat. 202; *Wash. & N. O. Tel. Co. v. Hobson*, 15 Grat. 132; *Beirne v. Rosser*, 26 Grat. 537, 541; *Warren v. Saunders*, 27 Grat. 265, 267; *Ante*, p. 625-'6.

(4), If it be *on behalf of the commonwealth* in the name of the attorney general, or when it may be necessary or proper to make any of the *following public officers a party defendant*, as representing the commonwealth, to wit: the governor, attorney general, treasurer, register of the land-office, or either auditor; or when it may be necessary or proper, to make any of the *following public corporations*

*parties defendant*, to wit : the board of education, board of public works, or any other public corporation composed of officers of government, of the funds and property of which the commonwealth is *sole owner*, or in which it shall be attempted to enjoin or otherwise suspend or affect any judgment or decree on behalf of the commonwealth, or any execution issued on such judgment or decree, the action or suit shall be brought in the *circuit court of the city of Richmond*

See V. C. 1873, c. 165, § 1, (cl. 4.)

(5), If a *judge of a circuit court* be interested in a case, which, but for such interest, would be proper for the jurisdiction of his court, the action or suit may be brought in any county or corporation in an *adjoining circuit*.

See V. C. 1873, c. 165, § 1, (cl. 5): *Randolph v. Tucker*, 11 Leigh, 665.

(6), Wherein the *cause of action*, or any part thereof, *arose*, although none of the defendants reside therein.

See V. C. 1873, c. 165, § 2.

(7), In case of an *injunction* to any judgment, act or proceeding, *wherein the judgment is rendered, or the act or proceeding is to be done, or is doing or apprehended*.

See V. C. 1873, c. 175, § 4, 6 to 9; *Winston v. Midlothian Coal M. Co.*, 20 Grat. 690; *Muller v. Bayly*, 21 Grat. 531.

(8), If defendant has *no known place of residence* in the commonwealth, in the county or corporation *wherein he is found*.

See V. C. 1873, c. 166, § 10; *Beirne v. Rosser*, 26 Grat. 541.

If the suit is instituted in any county or corporation contrary to these regulations, objection to the jurisdiction may always be made in one way or another; but the *time and mode of making it* are essentially different, according to circumstances. The *statutory* provision upon the subject is as follows: "Where the bill *shows on its face* proper matter for the jurisdiction of the court, no exception for want of such jurisdiction shall be allowed, unless it be taken by *plea in abatement*; and the plea shall not be received after the defendant has *demurred, pleaded in bar, or answered to the bill*, nor *after a rule to plead or decree nisi*." (V. C. 1873, c. 167, § 20.) From the terms of this enactment it appears, therefore, that the distinction referred to as to the *time and mode* of challenging the jurisdiction, is between those cases where the bill shows *on its face* proper matter for the jurisdiction of the court, and those where *on its face* the want of jurisdiction is apparent. In the former, the objection can be taken by *plea in abatement alone*, filed at the early stage of the cause indicated

above. In the latter, where it appears from the bill itself that the court has no jurisdiction, the objection may be taken not only by plea in abatement, or by demurrer, but also for the first time, *at the hearing*, or even in an *appellate court*. (Pollard v. Patterson, 3 H. & M. 67; Hickman v. Stout, 2 Leigh, 8, 9; Hudson v. Kline, 9 Grat. 385-'6; Berkley v. Palmer, 11 Grat. 627, 631; Wash. & N. O. Tel. Co. v. Hobson, 15 Grat. 122, 132; Jones v. Bradshaw, 16 Grat. 361; Green v. Massie, 21 Grat. 362; *Ante*, p. 868.)

A plea to the jurisdiction, (inaccurately styled by our statute a *plea in abatement*,) like all other dilatory pleas, must be verified by affidavit before it can be filed. (V. C. 1873, c. 167, § 38; *Ante*, p. 626, 628.) Its form, in an action of law, is stated *ante*, p. 626, and in a court of equity it is essentially the same, using the word *suit* instead of the word *action*, and is regulated by the same principles as in that passage are set forth.

The *subpoena* or summons is obtained in the same manner and upon like terms as was formerly described in the case of process in an action at law. *Ante*, p. 527 & seq. The *memorandum* furnished the clerk to enable him to issue the process in the case proposed here for the purpose of illustration, (*Ante*, p. 1110-'11), would be as follows:

"James Hart v. Jane Hart, widow, and the same Jane, administratrix *with the will annexed* of Thomas Hart, deceased, John Hart, (who is a non-resident of this Commonwealth,) Henry Wells, and Mary his wife, late Mary Hart, and Anne Hart, who is an infant under the age of twenty-one years; Summons in chancery, to

Rules.

G. R. C. A., p. q.

The process issued in pursuance of this memorandum or order, was formerly known as a *subpoena*, as above explained, and is in England addressed to the defendant or defendants themselves. In Virginia, since 1850, it has been designated a *summons*, (V. C. 1873, c. 166, § 5,) is addressed to the sheriff or other officer, commanding him to summon the defendant or defendants to answer the bill, and in form and treatment closely resembles the summons used in common law actions. (*Ante*, p. 524.) In the case supposed it would be as follows:

#### WRIT OF SUMMONS IN CHANCERY.

The Commonwealth of Virginia,

To the Sheriff of A county, greeting:

We command you that you summon Jane Hart, widow, and the same Jane, administratrix, *with the will annexed*, of Thomas Hart, deceased, John Hart, Henry Wells, and Mary his wife, late Mary Hart, and Anne Hart, to appear before the judge of our circuit court, for the county of A, at the clerk's office of our said court, at *rules* to be holden therefor, on the first Monday in — next, to answer a *Bill in Chancery* exhibited against them in our said court, by James Hill; and



unless they shall answer the said bill within one month thereafter, the court will take the same for confessed, and decree accordingly. And have then there this writ. Witness, B. T., the clerk of our said court, at the court-house, this — day of —, in the year of our Lord —, and of our foundation the —th.

Teste:

B. T., C. C.

The original practice in the courts of chancery, as might be anticipated from the account which has been given of the origin of its extraordinary jurisdiction, was to commence the suit in all cases *by filing the bill of complaint* of the plaintiff, which concluded by praying for the appropriate process, which was then issued accordingly. (Mitf. Eq. Pl. 6, 45; Coop. Eq. Pl. 16; 1 Daniell's Ch. Pract. 351, 511); and such is still the practice in many of these States, and in the courts of the United States; the rule prescribed by the supreme court of the United States being that "No process of *subpoena* shall issue from the clerk's office in any suit in equity *until the bill is filed in the cause.*" (1 Abb. U. S. Pract. 134.) But in Virginia, the *subpoena* or summons is generally issued in the first instance, and the bill is not usually, or at least not *necessarily*, filed until the return day of the summons, or indeed until a latter period still, as will be explained in the sequel. (2 Rob. Pr. (1st ed.) 280; V. C. 1873, c. 167, § 5, 6.) Where, however, an *injunction* is sought, the bill, with an affidavit annexed verifying its allegations, must be presented to the proper court or judge in the first instance, and if an injunction is awarded, a writ of *subpoena* or summons is then issued, upon which the order for the injunction is endorsed. (2 Rob. Pr. (1st ed.) 280; V. C. 1873, c. 175, § 3; Rob. Forms, 37, *note.*)

The summons in chancery is returnable at the same times, and is to be executed and returned in the same manner, as process in an action at law; and like proceedings are to be had upon the several returns; for all which the student is referred to the copious exposition formerly made of those subjects, and also of the mode of *securing to the plaintiff the effect of his suit*, (*Ante*, p. 545, 531 & seq. 539 & seq.)

## 2°. The Order of Publication.

Inasmuch as it appears from the statement of the case supposed, that one of the defendants, John Hart, lives in the State of Missouri, it will be needful to proceed against him as a *non-resident*, by an *order of publication*, the nature of which, and the method to be pursued in respect to it, have been fully explained in connexion with the action at law, (*Ante*, p. 534 & seq.), and being the same in suits in equity, need not be here repeated. The student, however, is advised carefully to review that explanation.

## SECTION II.

*The Rules or Orders with a view to mature the cause for hearing and Decree.*2<sup>d</sup>. Rules or Orders with a View to mature the Cause for Hearing and Decree.

The rules or orders which are made with a view to mature the cause for hearing and decree, would in some respects be better understood if they were postponed until the structure and form of the bill whereby the complainant sets forth his cause are explained; for some of them suppose that the bill has been filed, and cannot legally occur until it is filed. Upon the whole, however, it is deemed more expedient to introduce the discussion of them here, the reader being desired to observe that it is assumed that the bill has been filed in all cases where the contrary is not expressed.

The rules or orders in question, (which are as nearly as possible identical with those which have been so elaborately explained in connection with actions at common law, *Ante*, p. 546-'7, 566-'7, 598 & seq), may be described under the several heads of, (1), Rules and rule-days; (2), The rule or order for the appointment of a guardian *ad litem* to an infant, &c.; (3), The rules or orders when the bill is filed at the return-day of the process; (4), The rules or orders where the bill is not filed at the return-day of the process; and (5), Decree for money by confession in the clerk's office;

W. C.

1<sup>o</sup>. Rules and Rule-days.

It will be remembered that rules are *orders of court*, whether made in court or in the clerk's office, and rule-days are days set apart at intervals of a month for making in the clerk's office all needful rules and orders in causes pending, as well in chancery as at law.

The object in having rule-days thus every month, the place where the rules or orders are made, and the proceedings connected therewith; and the days appointed in each month for holding the rules, have all been particularly stated in another place, (*Ante*, p. 546-'7), and need not be here repeated.

2<sup>o</sup>. The Rule or Order for the Appointment of a *Guardian ad litem* to an Infant or Insane Defendant.

The power to appoint guardians *ad litem* to defend infants, and it would seem idiots and lunatics also, is incident to all courts, (1 Th. Co. Lit. 160, n (6); 171, & n (29); Mitf. Eq. Pl. 94; Stor. Eq. Pl. § 70; 1 Insts. Com. & Stat. Law, 432-'3); but it having been gravely questioned whether at common law the guardian so appointed

could be *compelled* to act, (Fox v. Cosby, 2 Call. 4; Wells v. Winfree 2 Munf. 343), it is enacted in Virginia by statute, that "the court in which the suit is pending, or the *clerk at rules*, may appoint a guardian *ad litem* to any infant or insane defendant, whether such defendant shall have been served with process or not. The court *may compel* the person so appointed to act, but he shall not be liable for costs, and shall be allowed his reasonable charges, which the party on whose motion he was appointed (who is usually the plaintiff) shall pay." (V. C. 1873, c. 167, § 17.)

We have formerly seen that, although the process against an infant is issued and executed as against an adult, and the bill setting forth the complaint is framed and filed in like manner, yet after that *no rule or proceeding* whatever can be *lawfully had*, until a guardian *ad litem* is designated; and any step that is taken is void as to the infant. Hence it is that the appointment of such guardian is usually made at the instance of the plaintiff. But in the interest of the infant himself, it is provided by statute, (V. C. 1873, c. 177, § 3,) that "no judgment or decree shall be stayed or reversed for the appearance of either party, being an infant under the age of twenty-one years, *by attorney*, if the verdict, (where there is one,) or the judgment or decree be *for him*, and *not to his prejudice*." (1 Insts. Com. & Stat. Law, 432-'3.)

The order appointing a guardian *ad litem* is in the form following:

#### ORDER APPOINTING A GUARDIAN AD LITEM.

At Rules held in the clerk's office of the circuit court for the county of A, on the — day of —, in the year —:

James Hart, ..... Complainant.  
against } In Chancery.

Jane Hart, widow, and the same Jane, administratrix *with the will annexed*, of Thomas Hart, deceased, John Hart, Henry Wells, and Mary, his wife, late Mary Hart, and Anne Hart, ..... Defendants.

On motion of the complainant, by counsel, — is assigned guardian to the defendant, Anne Hart, who is an infant, under the age of twenty-one years, to defend her in this suit.

#### 3°. Rules or Orders where the Bill is filed *at the Return-day of the Process*.

Supposing the defendant *to appear* at the return-day of the process, or if that be the first day of a term, at the first rule-day thereafter, but having appeared, *to fail to plead, answer, demur or disclaim*, if the bill has been filed, a *rule* (the common order), may be given him to plead, &c.; and if at the next rule-day, a month afterwards, he con-

tinues in default, the bill is *taken for confessed*, against him, (the equivalent of an office-judgment,) and then or afterwards the plaintiff may have the *cause set for hearing* as to such defendant. (V. C. 1873, c. 167, § 43, 49.)

And supposing the defendant *not to appear* at the return-day of the process, &c., the plaintiff having then filed his bill, may have a *decree nisi* against such defendant, (no service of which *decree nisi* is requisite); and if at the rules following the defendant continues in default, the plaintiff's bill is *taken for confessed*, and then or afterwards the plaintiff may *set the cause for hearing* as to such defendant. (V. C. 1873, c. 167, § 43, 49.)

The student is desired specially to note here, that whilst causes at common law are brought up from the rules to the court docket for hearing *as of course*, without any special direction from either party, as they are matured, (*Ante*, p. 600,) causes in chancery, as appears from the two foregoing paragraphs, must be *specially set for hearing* by the plaintiff, in case of a decree by default; and we shall presently see that where four months have elapsed *after the filing of the answer*, without the cause being so set, and without exceptions being filed to the answer, the defendant may also *set the cause for hearing*. (V. C. 1873, c. 167, § 49.)

And as in actions at law, the office-judgment is allowed to be set aside by a plea to the merits filed in court, (*Ante*, p. 600,) so in chancery causes it is provided that, at any time before *final decree*, a defendant may be allowed to file his answer; but a cause shall not be sent to the rules, or continued, because an answer is filed, unless *good cause be shown therefor*. (V. C. 1873, c. 167, § 35.)

4°. Rules or Orders where the Bill is not filed at the Return-day of the Process.

If the bill be not filed at the return day of the process, or if that be the first day of a term, on the first rule-day thereafter, the defendant may then appear, and give a rule with the clerk for the plaintiff to file the same; and if he fails to do so at the succeeding rule day, or shall at any time after the defendant's appearance fail to prosecute his suit, he shall be *non-suited*, and shall pay to the defendant, besides his costs, five dollars. (V. C. 1873, c. 167, § 5.) But *every non-suit* (which is supposed to include causes in chancery, as well as at law), may be set aside by the court *at the next term*, in the circuit court before the last day of the term, or the fifteenth day thereof, (whichever shall happen first,) and in the corporation court before the last day of the *next term*. The statute does indeed say, before the last day of "the next term *designated for the trial of civil cases in*

*which juries are required;*" but as the whole section applies in terms exclusively to *non-suits* in actions at law, and can be made to refer to proceedings in equity only by adaptation and construction, it is presumed that the term at which the *non-suit* in equity must be set aside, is the *next term in succession*, causes in equity being cognizable at *every term* of the corporation court. (V. C. 1873, c. 167, § 45; Id. c. 154, § 36; Id. c. 179, § 1.)

And if *three months elapse* after the process is returned executed as to any one or more of the defendants, *without the bill being filed*, the clerk shall enter the suit dismissed, although none of the defendants may have appeared. (V. C. 1873, c. 167, § 6.) But where the suit is not actually dismissed by the clerk, and the bill is at length filed, and the defendant files his answer, and consents to a hearing upon the merits, he thereby waives the objection, and cannot, after an adverse decree, avail himself of it in order to impeach the proceeding. (Buchanan v. King, 22 Grat. 418.)

5°. Decree for Money by Confession in the Clerk's Office.

A decree for money by *confession* might always, it seems, have taken place in court in chancery causes, as in actions at law, and that at any stage of the proceeding, without a bill, as well as with one, for any amount agreed on by the parties. (*Ante*, p. 604; 1 Rob. Pr. (1st ed.) 263; Thornton v. Smith, 1 Wash. 83; Leftwich v. Stovall, 1 Wash. 305.) But no such confession in the clerk's office was allowable until it was admitted by statute, which appears at first to have contemplated only proceedings at law, but at present includes suits in equity also. The provision is that, "In *any suit*, a defendant may confess a judgment or decree in the clerk's office, for so much principal and interest as the plaintiff may be willing to accept a judgment or decree for. The same shall be entered of record by the clerk in the order or minute book, and be as final and as valid as if entered in court on the day of such confession, except merely that the court shall have such control over it as it has over all other proceedings in the clerk's office during the preceding vacation." (V. C. 1873, c. 167, § 42, 52.)

This statute is understood to admit of confessions in the clerk's office only *in vacation*, and *not during the term*, but it is regarded as made in vacation constructively, when the acknowledgment occurs on the morning of the first day of the term, before the hour for the opening of the court. (Brown v. Hume, 16 Grat. 456; *Ante*, p. 604.)

These proceedings in the clerk's office will be better understood by exhibiting the several entries as they would

occur in the clerk's *rule-book*, in each of the *five cases* contemplated, namely: (1), Where the *bill being filed*, the *defendant appears*, but *does not respond in any way*; (2), Where the bill being filed, the defendant *does not appear*; (3), Where the bill *is not filed*, and the *defendant appears*, and gives a rule to file it, which is not obeyed; (4), Where the bill *is not filed*, and the *defendant does not appear*; and (5), Decree for money by confession in the clerk's *office* for an agreed sum.

JUNE RULES.	JULY RULES.	AUGUST RULES.	SEPT RULES.	OCTOBER TERM.
(1), <i>Bill filed.</i> Def't appears. Rule to plead, &c.	Com. order confirmed. Bill taken for confessed.	Cause set for Hearing by Plaintiff.		Answer filed by leave of court and General Replication.
(2), <i>Bill filed.</i> Def't fails to appear. Decree nisi.	Decree nisi confirmed. Bill taken for confessed. Cause set for hearing.			Answer filed by leave of court and General Replication.
(3), <i>Bill not filed.</i> Def't appears. Rule for Bill.	Bill not filed. Non-suit.			Non-suit set aside by court and Bill allowed to be filed.
(4), <i>Bill not filed.</i> Def't does not appear.	Bill not filed.	Bill not filed.	Bill not filed. Suit dismissed by Clerk.	
(5), Decree for £— by confession.				

## SECTION iii.

*The Pleadings.*3<sup>d</sup>. The Pleadings.

The pleadings in chancery may be presented under the several heads of; (1), The plaintiff's bill of complaint; (2), The defence by the defendant; and (3), The general replication by the plaintiff to the defendant's defence, including the joinder in demurrer;

W. C.

1<sup>o</sup>. The Plaintiff's Bill of Complaint.

A suit to the extraordinary jurisdiction of the court of chancery is commenced by preferring a *bill*, as it is called, in the nature of a *petition*, addressed to the judge of the chancery court. Except in some early instances, bills have been always in the *English language*; and a suit preferred in this manner in the court of chancery has been, therefore, commonly termed in England a suit by *English bill*, by way of distinction from the proceedings in suits within the *ordinary* jurisdiction of the court, which, as also in the other courts of common law, till the Stat. 4 Geo. II, c. 26, (A. D. 1731,) were entered and enrolled more anciently in the French or Norman tongue, and afterwards by Stat. 36

Edw. III, c. 15, (A. D. 1363,) in the Latin. (Mitf. Eq. Pl. 7, 8; 1 Insts. Com. & Stat. Law, Hist. Sum. p. xxxi.)

Having thus seen the *nature* of a bill in chancery, we may proceed to take notice of, (1), The several parts of which a bill consists; (2), The several kinds of bills; (3), The frame of a bill; and (4), The time at which it should be filed, and the steps thereupon to be taken;

W. C.

1<sup>st</sup>. The *Several Parts* of which a Bill in Chancery ordinarily consists.

An *original* bill in chancery ordinarily consists, according to the English practice, of *nine* parts, in ours of *eight*, and not unfrequently of *six* only. Other bills *not original*, of which we shall presently see more, bear a resemblance in form to an original bill, and whatever discrepancies exist arise either from the purposes for which the bill is framed, or the circumstances under which it is exhibited; so that the practitioner is not likely to be embarrassed when he has made himself acquainted with the nature and design of such non-original bills. (Mitf. Eq. Pl. 41, 47.)

Those parts are as follows:

(1), The address to the Chancellor, *by his Official Designation*.

See Sands' Suit in Equity, 313.

(2), The names of the parties complainants, with their respective places of abode.

The residence of the complainants is required to be stated, in order that the defendants may know whither to resort for their costs, or to compel obedience to any order or process of the court.

And it should be observed that if a party, whether complainant or defendant, be a party in his *natural*, and also in *any fiduciary* capacity, he should be named in both characters, and so if concerned in several fiduciary characters, he should be made *a party in all*. (Pennington v. Hanby, 4 Munf. 144.)

(3), The *statement* of the complainant's case, called the *stating part* of the bill.

The stating part of the bill sets out the essential facts upon which the complainant relies, succinctly, yet, *with all possible perspicuity*.

(4), The general charge of *confederacy or combination* against the persons complained of.

It will be remembered that amongst the causes which gave rise to the equitable or extraordinary jurisdiction of the court of chancery in England, the second mentioned was the *combination and confederacy* of powerful lords to

overawe, resist or pervert the ordinary administration of justice. (*Ante*, p. 1100.) This part of the bill has reference to that fact. In modern times it is quite superfluous; in England is not unfrequently omitted, (1 Dan. Ch. Pr. 426,) and generally in Virginia; and although according to Judge Story, it is usual in the State courts to retain it, (Stor. Eq. Pl. § 29,) the rules of the Supreme court leave it optional to omit it in the practice of the United States courts. (1 Abb. U. S. Pr. 136.)

(5), The statement of any anticipated defence, *in order to show its futility*, called *the charging part of the bill*.

Thus the general averment of confederacy is followed by an allegation that the defendants *pretend* or set up the matter of their expected defence, and by a *charge* of the matter which may be used to avoid it. The employment of this charging part has the further advantage of doing away with the necessity of a *special replication* (which was formerly used,) in rebuttal of the defence anticipated, and of laying a foundation for interrogatories and for the discovery which is sought in reference to the matter of such defence. Thus, if a bill is filed on any equitable ground by an heir who apprehends his ancestor has made a will; he may state his title as heir, and alleging the will by *way of pretence* on the part of the defendants claiming under it, make it a part of his case without admitting it; for a charge in the bill that the defendant *pretends* that a certain fact has taken place sufficiently puts the fact in issue. (Mitt. Eq. Pl. 42; 1 Dan. Ch. Pr. 428; *Stafford v. Brown*, 4 Pai. (N. Y.) 88; *Par-ker v. Carter*, 4 Munf. 288.)

It is, perhaps, too common to omit the charging part of the bill. To insert it without any definite object is, indeed, superfluous; but for the purposes indicated it is not unfrequently highly expedient. The rules of the Supreme court leave it optional to insert it or not in the practice of the United States courts. (Stor. Eq. Pl. § 33; 1 Dan. Ch. Pr. 428-9; 1 Abb. U. S. Pr. 136.)

(6), The allegations intended *to give color to the jurisdiction of the court*.

The averment is that the acts complained of are *contrary to equity and good conscience*, and tend to the injury of the complainant, and that the complainant has *no remedy*, or *not a complete remedy* without the assistance of a court of equity, in which court the case is properly cognizable.

These general averments do not avail, however, unless they are sustained by the case as shown in the bill, making apparent the jurisdiction of the court. And if the case



shown in the bill befits the jurisdiction, it is not prejudiced by the omission of this clause or part, which seems, therefore, to be always superfluous. The Supreme court rules make it optional to insert it or not in cases in the United States courts. (Mitf. Eq. Pl. 43; 1 Dan. Ch. Pr. 430; Stor. Eq. Pl. § 34; 1 Abb. U. S. Pr. 136.)

(7), Prays that the defendants may *severally answer* the matter contained in the bill *fully and on oath*, not only according to the *positive knowledge of each one*, but according to his *remembrance, information and belief*.

As the principal end of an answer upon the oath of the defendants is to supply proof of the matters needful to support the plaintiff's case, it is, therefore, required of the defendants in their answer, either to admit or deny *all the facts* set forth in the bill, with their attending circumstances, or to deny having any knowledge, information or recollection of them, and to declare their inability to form any belief concerning them. But as experience has proved that the substance of matters stated and charged in a bill may be frequently evaded by answering according to the letter only, it has become a practice to add to the general requisition of an answer a repetition by way of interrogatory of the matters most essential to be answered, framed with such particularity and such variations as will prevent evasion and compel a full answer. This is commonly termed, from these interrogations, the *interrogating part of the bill*, and must be founded on the averments in the stating and charging parts; so that if there is nothing in those parts to warrant any interrogatory, the defendant is not compellable to answer it. But a variety of questions may be founded on a *single charge*, if they are relevant to it. Thus, if a bill is filed against an executor for an account of the personal estate of his testator, upon the single charge that he has *proved the will* may be founded every inquiry needful to ascertain the amount of the estate, its value, the disposition made of it, the situation of any part remaining unexpended in the payment of the debts of the testator, and any other circumstance leading to the account required. (Mitf. Eq. Pl. 44-'5; 1 Dan. Ch. Pr. 430; Stor. Eq. Pl. § 35 & seq.)

The interrogating part of a bill is not regarded as absolutely necessary; but it is often highly useful in order to sift the conscience of the defendant, and is almost universal in practice. (Stor. Eq. Pl. 38; Thornton v. Gordon, 2 Rob. 719.)

(8), Prayer for *Relief*.

The prayer for relief is first for *special relief*, such as

the complainant contemplates as desirable, and as warranted by the case made by the bill; and second, for *general relief*, at the discretion of the court. Lest the case should present in evidence a new aspect, or the court should differ with him as to the appropriate relief, the complainant prays "for such other and further relief as may be adapted to the nature of the case, and agreeable to equity and good conscience;" and under such prayer for general relief, he may in most cases obtain such relief as his case entitles him to, provided it be *not inconsistent with the specific relief prayed for*, nor relate to a claim distinct from that demanded or put in issue by the bill. The prayer for specific relief, therefore, in complicated cases, should be framed with great care and attention, and if need be, in several aspects, so that if the court determines against the complainant in one aspect of the case, it may yet afford him assistance in another. (Mitf. Eq. Pl. 38-'9; 1 Dan. Ch. Pr. 434-'5; Stor. Eq. Pl. § 42; 2 Rob. Pr. (1st ed.) 291 & seq; Soden v. Soden, cited in Hiern v. Mill, 18 Ves. 119; Cook v. Martyn, 2 Atk. 3; Grimes v. French, 2 Atk. 141; Dormer v. Fortescue, 3 Atk. 132; Johnson v. Johnson, 1 Munf. 554, *note*; Sheppard v. Starke, 3 Munf. 29; Rootes v. Holliday, 6 Munf. 251; Harvey v. Alexander, 1 Rand. 219; Beall v. Silver, 2 Rand. 401; James v. Bird, 8 Leigh, 513.)

(9), Prayer for Process.

The process usually prayed for is the *subpoena*, or in Virginia, a summons, as we have seen; and with us the prayer is couched in terms the simplest and most direct possible: "And may a summons issue against the several defendants herein before named." (Mitf. Eq. Pl. 45; 1 Dan. Ch. Pr. 444, &c.; Stor. Eq. Pl. § 44.) The practice in England is much more strict, it being there the established rule that the names of all the persons who are intended to be made defendants shall be inserted in the prayer for process; for the mere naming of a party in a bill, without thus praying process against him as a defendant, does not make him a party. (1 Dan. Ch. Pr. 445.) And by the rules of the supreme court it is provided, in respect to the chancery courts of the United States, that "the prayer for process *for* (of ?) *subpoena* in the bill shall contain the names of all the defendants named in the introductory part of the bill; and if any of them are known to be infants under age, or otherwise under guardianship, shall state the fact, so that the court may take order thereon as justice may require, upon the return of the process. If an injunction, or a writ of *ne exeat regno*, or any other special order pending the suit, is asked for in the

prayer for relief, that shall be sufficient without repeating the same in the prayer for process." (1 Abb. U. S. Pr. 136.)

If any special order is desired, *e. g.* an *injunction*, it is usually prayed for as part of the specific relief sought, and in Virginia, it is not customary to refer to it in the prayer *for process*.

The indiscriminate use in all cases of parts (3), (5) and (7), has given rise to a reproach not unmerited, that a bill in equity contains the same story *thrice told*. The fear of incurring this imputation, however, should not prevent the practitioner from employing all these parts when his judgment shall approve it as expedient. On the other hand, it is certain that all the foregoing nine parts are not in every case called for, and a sound judgment must be exercised as to which may with safety and propriety be omitted. (Mitf. Eq. Pl. 47.)

In order to guard against the introduction into bills, of matter criminal, impertinent or scandalous, the English wholesome rule is that every bill must be *signed by counsel*; and if it be found to contain such matter as above referred to, it is to be expunged, and the counsel shall pay costs to the party aggrieved. But nothing *relevant* is considered as *scandalous*. (Mitf. Eq. Pl. 47.) A similar rule is prescribed by the Supreme court to the United States courts in chancery. (1 Abb. U. S. Pr. 137.) It is supposed that the same rule holds in Virginia; but the practice is very loose, and bills are often not signed at all.

## 2<sup>d</sup>. The *Several Kinds* of Bills in Chancery.

The several kinds of bills in chancery are (1), Original bills; (2), Bills not original; and (3), Bills in the nature of original bills, though occasioned by former bills;  
W. C.

### 1<sup>st</sup>. Original Bills.

An original bill is one which relates to some matter not before litigated in the court by the same persons, standing in the same interest. Such bills are divided into (1), Bills praying relief; and (2), Bills not praying relief. (Mitf. Eq. Pl. 31 & seq, 36 & seq);  
W. C.

### 1<sup>st</sup>. Original Bills *Praying Relief*.

Original bills praying relief have been ranked under three heads, namely; (1), Original bills praying the decree of the court touching some right claimed by the plaintiff in opposition to the defendant; (2), Original bills of interpleader; and (3), *Certiorari* bills. (Mitf. Eq. Pl. 32);

#### 1<sup>st</sup>. Original Bills praying the Decree of the Court touch-

*ing some Right Claimed by the Plaintiff* in opposition to the Defendant.

An original bill of this description sets forth distinctly the rights of the complainant; by whom and in what manner he is injured; in what he wants the assistance of the court; and that he is either without remedy except in a court of equity, or at least can be most effectually relieved there. It then prays that the parties defendant may answer upon oath the matters charged against them; that the proper assistance or relief may be granted the complainant; and for these purposes that proper process may be issued to require the appearance of the defendants. (Mitf. Eq. Pl. 37.)

All persons *concerned in the demand*, or who may be *affected by the relief prayed or expected*, ought to be made parties to such a bill; or as it has been otherwise expressed, *all who have and all who want the subject-matter* of the controversy. But if any necessary parties are omitted, or unnecessary parties are inserted, the court upon application in due time will permit the proper alterations to be made. (Mitf. Eq. Pl. 39.)

2<sup>d</sup>. Original Bills of *Interpleader*.

A bill of interpleader is where the person exhibiting the bill claims no right in opposition to the persons against whom it is exhibited, but prays the decree of the court touching the rights of those persons, for the safety of the person exhibiting the bill; as in case of a stakeholder, where both parties claim the stakes, and he knows not to which to pay them. He states his own position and the several claims of the parties, adverse to one another, and prays that they may *interplead*, so that the court may adjudge to whom the subject-matter belongs, and he may be indemnified. (Mitf. Eq. Pl. 32, 47-'8 & seq; Stor. Eq. Pl. § 291 & seq; V. C. 1873, c. 149, § 1; George v. Pilcher, 28 Grat. 305.)

3<sup>d</sup>. Original Bills praying the *Writ of Certiorari*.

When an equitable right is sued for in an inferior court of equity, and by reason of the limited jurisdiction of the court, or otherwise, complete justice cannot be administered, then the defendant may file a bill in chancery, praying a special writ, called a *writ of certiorari*, to remove the cause into that court. It prays for no answer, nor writ of *subpœna*, but seeks merely the removal of the cause. (Mitf. Eq. Pl. 32-'3, 49-'50.)

Formerly bills of this sort were not unfrequent in Virginia, in order to remove causes at law or in equity

from the county or corporation into the circuit court. (1 Rob. Pr. (1st ed.), 192-'3 ; 2 Do. 343.) But the county court having ceased to have cognizance, either of actions at common law or of causes in equity, and the course of appeal from the corporation court being now not to the circuit court, but to the court of appeals, the use of a bill praying for a writ of *certiorari* from the court of chancery is thus superseded with us. There are, however, other occasions when a writ of *certiorari*, not, however, as an equitable proceeding, may still be used, as to bring up the proceedings before a justice of the peace, with a view to inquire into their regularity, in which case the writ is to be awarded by the circuit court of the county or corporation in which is the record or proceeding to which the writ relates ; and also by any *appellate court*, in order to obtain a complete copy of the record from the court below. (V. C. 1873, c. 166, § 4.)

2<sup>h</sup>. Original Bills *not Praying Relief*.

Original bills not praying relief are, (1), Bills to perpetuate testimony ; and (2), Bills for discovery of facts and documents within the knowledge or power of the person against whom the bill is exhibited. (Mitf. Eq. Pl. 33, 50 & seq.)

1<sup>i</sup>. Bills to *perpetuate the Testimony of Witnesses*.

A bill to perpetuate the testimony of witnesses must state the matter touching which the plaintiff is desirous to have the evidence taken, and must show that he has some interest in the subject, and that the defendant has an adverse interest ; and it must also pray leave to examine witnesses touching the matter so stated, to the end that their testimony may be preserved and perpetuated. (Mitf. Eq. Pl. 50, 51.)

The bill ought also to show that the facts to which the testimony proposed to be taken is conceived to relate, cannot be *immediately* investigated in a court of law ; as in the case of a person in possession without any present disturbance, or that before the facts can be investigated in a court of law, the evidence of a material witness is liable to be lost by his death, or departure from the State, all of which ought to be verified by affidavit, as is the case of all bills which have a tendency to change the jurisdiction of a subject from a court of law to a court of equity. • (Mitf. Eq. Pl. 51.)

The bill must be for the *sole purpose* of perpetuating the testimony, and should not also pray relief. The two objects cannot be embraced in the same bill.

(*Miller v. Sharp*, 3 Rand. 41.) And in order that the depositions taken in pursuance of such a bill may afterwards be read, it must appear that the witnesses are dead, or out of the power of the court in which the subsequent cause is pending. (*Lawrence v. Swann*, 5 Munf. 332.)

In Virginia, the proceeding to perpetuate testimony is much simplified, and varies according as a suit is, or is not, pending.

If a suit *is pending*, the deposition is taken without a commission, if the witness be within the State, otherwise by virtue of a commission to be issued by the clerk, reasonable notice being given to the adverse party of the time and place of taking it. (V. C. 1873, c. 172, § 34, 36.)

If no suit be pending, the proceeding, instead of being in court upon a bill filed, may be in an informal way before a *commissioner in chancery*, of the court where such a bill might have been exhibited, upon a petition setting forth the same matter as would be in a bill, and what persons may be affected by the testimony. And thereupon, on reasonable notice to the parties who may be so affected, the commissioner is to take the evidence of any witnesses adduced on either side, to be certified and returned to the clerk of the court which appointed such commissioner, and to have the same effect as if taken on a bill to perpetuate testimony. (V. C. 1873, c. 172, § 40.)

2. Bills for *Discovery of Facts* within the Knowledge of the Person against whom the Bill is Exhibited, or of *Deeds and Writings* in his Custody or Power.

A bill of discovery, as here understood, seeks no relief in consequence of the discovery. It is used in aid of the jurisdiction of some other court; as to enable the plaintiff to prosecute or defend an action at law; or any other legal proceeding of a nature merely civil before a jurisdiction unable to compel a discovery on oath. (Mitf. Eq. Pl. 52.)

A bill of this nature must state the matter touching which a discovery is sought, the interest of both plaintiff and defendant in the subject, and the right of the former to require the discovery from the other. And if relief is prayed for, it must appear by affidavit that the party has not, without a discovery, the means of proving the fact or writing in question; for it is only on that circumstance that the jurisdiction of the court to *give relief* is founded. But a bill *for discovery merely* requires no such affidavit, nor is it needful

that the discovery should be indispensable to the party's case. He is entitled to it if he states and shows that it is *material evidence*, although merely cumulative. (Mitf. Eq. Pl. 52-3, 155; Stor. Eq. Pl. § 324, a; Coop. Eq. Pl. 198, 208; 2 Rob. Pr. (1st ed.) 43 & seq; Montague v. Dudman, 2 Ves. Sen. 398; McFarland v. Hunter, 8 Leigh, 492; Gregory v. Marks, 1 Rand. 355; Rankin v. Bradford, 1 Leigh, 163; Hardin v. Hardin, 2 Leigh, 572; Meze v. Mayse, 6 Rand. 658; Webster v. Couch, 6 Rand. 519.)

Bills of discovery are now with us entirely superseded in practice by two statutory provisions, one allowing a court of law to compel a discovery upon oath, in answer to interrogatories filed, wherever it would be compelled upon a bill for discovery, if the interrogatories have not been unreasonably delayed, (V. C. 1873, c. 172, 44, 45); and the other declaring parties to suits, with some important qualifications, to be *competent* to give evidence on their own behalf, and to be *competent and compellable* to attend and give evidence on behalf of any other party to the proceeding. (V. C. 1873, c. 172, § 21, 22; Acts, 1876-'7, p. 184, c. 198; *Ante*, p. 690-'91.)

## 2<sup>d</sup>. Bills not Original.

A suit imperfect in its frame, or become so by accident before its end has been obtained, may in many cases be rendered perfect by a new bill, which is not considered as an original bill, but merely as an addition to or continuance of the former bill, or both. A bill of this kind may be (1), A supplemental bill; (2), A bill of revivor; and (3), A bill both of revivor and supplement. (Mitf. Eq. Pl. 33);

W. C.

## 1<sup>h</sup>. Supplemental Bills.

A supplemental bill is an addition to the original bill, in order to supply some defect in its original form and structure, which cannot properly be supplied by *amendment*, which latter ought to be employed wherever it is admissible, instead of a supplemental bill. Thus, the introduction of *new parties*, who ought to have been, but were not introduced at first, is always accomplished by an *amendment* to the original bill, and matter which arose before the commencement of the suit should generally be inserted also by amendment, and not by a supplemental bill. (Mitf. Eq. Pl. 53 & seq. 59 & seq; Stor. Eq. Pl. § 332 & n 1; 2 Rob. Pr. (1st ed.) 295.) The introduction of new parties may be effected by amendment of the bill at any time before

the hearing, by leave of court, which is never denied if the justice of the case requires the amendment. (Mason v. Nelson, 11 Leigh, 228; Smith v. Smith, 4 Rand. 102; Parrill v. McKinley, 9 Grat. 7; Stephenson v. Taverners, 9 Grat. 405; Holland v. Trotter, 22 Grat. 139.)

But no amendment is for the most part allowable, (save to introduce new parties,) after issue joined, and witnesses examined; nor for the introduction of facts which have occurred since the commencement of the suit. Wherever, therefore, it is desired to modify the plaintiff's case after issue is joined and witnesses are examined, or by the introduction of facts which happened after the commencement of the suit, a *supplemental bill* must be resorted to; as also it must be in respect to facts which occurred before the commencement of the suit, where, without the default of the plaintiff, it is too late to insert them by amendment. (Mitf. Eq. Pl. 53 & seq; Stor. Eq. Pl. § 332, 333, 335, 336.)

A supplemental bill is also proper in order to introduce new parties whose interest has arisen since the institution of the suit, to introduce new charges, or to put in issue a new material fact, such as fraud, a new title acquired since the suit was brought, or otherwise to present a new and different case from that exhibited in the original bill. (Mitf. Eq. Pl. 53, 59, 60, &c.; Stor. Eq. Pl. § 335, 336.)

And lastly, a supplemental bill is employed to carry into complete effect a decree already pronounced, and to get the full benefit of a decision; and of course for this purpose it may be filed as well after as before a decree. (Mitf. Eq. Pl. 59; Stor. Eq. Pl. § 335.)

A supplemental bill may be filed, it would seem, without the previous leave of court, except where it seeks to change the original structure of the bill, and to introduce a new and different case. But even though the previous leave may be sometimes dispensed with, the court will yet see to it that no supplemental bill shall be resorted to where the same end may be attained by an *amendment*, nor where the plaintiff has been guilty of *laches* in delaying it too long after the discovery of the new matter which he proposes to introduce. (Stor. Eq. Pl. § 333, & n 4, 338 a.)

It is not, for the most part, needful to give notice of an application for leave to file a supplemental bill, although the court may in its discretion direct such notice. (2 Rob. Pr. (1st ed.) 295; Eager v. Price, 2



Pai. (N. Y.) 333; Lawrence v. Bolton, 3 Pai. 294.) And even though the supplemental bill prays an injunction, the leave to file the bill and the injunction may be granted at the same time; indeed, the award of the injunction implies the leave to file the bill. (Eager v. Price, 2 Pai. 333.)

We have seen that a supplemental bill may be filed even *after a decree*, in order to carry it into effect. More frequently, however, it is before decree, although it may be after the hearing. Thus, if at the hearing it appears that the plaintiff's case is a good one, but that it is so defectively stated in the bill that no decree can be rendered on it, an opportunity ought to be given him to set it forth more satisfactorily by a supplemental bill: (2 Rob. Pr. (1st ed.) 295-'6; Zane v. Zane, 6 Munf. 416; Smith v. Smith, 4 Rand. 95; Clifton v. Haig, 4 Desauss. (S. C.) 346.)

Where new parties are introduced by a supplemental bill, and it has no other object, the original defendants need not be made parties thereto, unless they have an interest in the supplemental matter, or may be affected by the interest of the new parties. But in the latter event, or if the supplemental bill has another object besides the introduction of *new parties*, the original defendants ought to be made parties thereto; for the cause must be heard upon the supplemental and original bills together, at one and the same time, so that in the case supposed the original parties ought to have an opportunity to answer the charges contained in the supplemental bill. (Mitf. Eq. Pl. 69, 70; Stor. Eq. Pl. § 334; 2 Rob. Pr. (1st ed.) 296; Ensworth v. Lambert, 4 Johns. Ch. R. (N. Y.) 605; McGown v. Yerks, 6 Johns. Ch. R. 450; Lawrence v. Bolton, 3 Pai. (N. Y.) 294; Shaw v. Bill, 5 Otto, (95 U. S.) 14.)

A supplemental bill must state the original bill, and the proceedings thereon; and if the supplemental bill is occasioned by an event subsequent to the original bill, it must set forth the event, and the consequent alteration with respect to the parties, and as we have seen, must in general pray that the original defendants shall appear and answer the charges it contains. (Mitf. Eq. Pl. 69, 70.)

In Virginia it is provided by statute, that the plaintiff may *of right* amend his bill before the defendant's appearance, and, notwithstanding such appearance, a plaintiff in equity may, at any time in the vacation of the court wherein the suit is pending, file in the clerk's office an amended or supplemental bill, or bill of re-

vivor; whereupon the same proceedings may be had as if leave to file it had been previously obtained in court, but the court, on motion of a defendant, made at the term to which process to answer the same is returned executed on him, or if it be returnable to rules, at the first term after it is so returned, may dismiss such amended or supplemental bill, or bill of revivor. (V. C. 1873, c. 167, § 15; *Holland v. Trotter*, 22 Grat. 139.)

2<sup>b</sup>. Bills of Revivor.

A *bill of revivor* is a continuance of the original bill, when by death, some party to it has become incapable of prosecuting or defending a suit, or a female plaintiff has by marriage incapacitated herself from suing alone, and the interest of the decedent is transmitted to the representative which the law gives or ascertains, as an heir at law, executor or administrator; so that the title cannot be disputed, at least in the court of chancery, but the person in whom the title is vested is *alone to be ascertained*; and so in the case of a marriage of a *feme*, where the person of the husband is *the sole fact to be ascertained*. (Mitf. Eq. Pl. 33, 63-4, &c.)

Such a bill must state the original bill, and the several proceedings thereon, and the abatement; it must show a title to revive and charge that the cause ought to be revived, and stand as to the new parties in the same condition as it did in respect to their predecessors at the time the abatement happened; and it must pray that the suit may be revived accordingly. (Mitf. Eq. Pl. 70 & seq.)

In Virginia, however, bills of revivor have long been substituted by a simple writ of *scire facias*, or *motion*, as was formerly explained in connexion with causes at common law, (*Ante*, p. 792 & seq, 796), to which the reader is referred. But it is still sometimes necessary to use the next sort of bill, namely, a bill of *revivor and supplement*, and also a *bill in the nature of a bill of revivor*.

3<sup>b</sup>. Bills of Revivor and Supplement.

A bill both of *revivor and supplement* continues a suit upon abatement by death, or by marriage of a female party, &c., and at the same time does the office of a *supplemental bill*, by supplying defects which have arisen since the institution of the suit, &c. It is, therefore, a compound of a bill of revivor and of a supplemental bill, and in that joint character states the original bill and proceedings thereon, and the subsequent event, and states also the consequent alteration or acquisition of interest with respect to the parties, or

whatever new matter may be appropriate to a supplemental bill. (2 Rob. Pr. (1st ed.), 296; Westcott v. Cody, 5 Johns. Ch. R. (N. Y.) 342; Pendleton v. Fay, 3 Paige, 204; Templeman v. Steptoe, 1 Munf. 339.)

3<sup>d</sup>. Bills in the *Nature of Original Bills*.

Bills in the nature of original bills, which yet suppose some previous controversy to have taken place between the parties in the same court of equity, may be enumerated as follows: (1), A cross-bill; (2), A bill of review; (3), A bill in nature of a bill of review; (4), A bill to impeach a decree on the ground of fraud; (5), A bill to suspend or avoid the execution of a decree; (6), A bill to carry a decree into execution; (7), A bill in nature of a bill of revivor; and (8), A bill in nature of a supplemental bill;

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1<sup>h</sup>. A Cross-Bill.

A cross-bill is a bill exhibited by a defendant against a plaintiff, or other parties in a former bill still depending, touching the matter in litigation in the first bill. (Mitf. Eq. Pl. 34, 75.)

A bill of this kind is usually brought to obtain either a necessary discovery, or full relief to all parties. It frequently happens, and particularly if any question arises between *two co-defendants* to a bill, that the court cannot make a complete decree without a cross-bill, and sometimes more than one cross-bill, to bring every matter in dispute completely before the court, litigated by the proper parties, and upon proper proofs. Under these circumstances, it becomes necessary for some one of the defendants to the original bill to file a bill against the plaintiff and the other defendants in that bill, or some of them, and bring the litigated point properly before the court. A cross-bill should state the original bill, and the proceedings thereon, and the rights of the party exhibiting the bill which are necessary to be made the subject of a cross-litigation, or the ground on which he resists the claims of the plaintiff in the original bill, if that is the object of the new bill. (Mitf. Eq. Pl. 75 & seq; 2 Rob. Pr. (1st ed.) 318, &c.; Moorinan v. Smoot, 28 Grat. 86.)

It is settled law that a party shall not question in his cross-bill what he has admitted in his answer, nor in anywise contravene his answer, to which he has *previously sworn*. (2 Rob. Pr. (1st ed.) 318; Hudson v. Hudson, 3 Rand. 117.) And as the cross-bill is intended only in aid of the defence to the original suit, its matter cannot be more extensive than the original

defence, unless when it be such as has arisen subsequently; although it may perhaps set up additional facts as constituting part of the same defence, relative to the same subject-matter. (2 Rob. Pr. (1st ed.) 318; Underhill v. Van Cortlandt, 2 Johns. Ch. R. (N. Y.) 355; Brown v. Story, 2 Pai. (N. Y.) 594; Galatian v. Erwin, 1 Hopk. Ch. R. (N. Y.) 58, 59.)

According to the practice in England, if the cross-bill is filed before the answer to the original bill is put in, and such answer is then filed in due time, all proceedings in the original cause are stayed until the cross-bill is answered, and then both causes proceed *pari passu*. (2 Rob. Pr. (1st ed.) 318; Ramkissenseat v. Barker, 1 Atk. 21.) And in Virginia it is provided by statute, that when a cross-bill is filed, the defendants in the first bill shall answer it, (that is, the bill,) before the defendants in the cross-bill are compelled to answer that (V. C. 1873, c. 167, § 16); which, however, is only affirmatory of the pre-existing rule. (Stewart v. Roe, 2 P. Wms. 435; Long v. Bieton, 2 Atk. 218; Johnson v. Frear, 2 Cox, 371; Noel v. King, 2 Madd. (Am. ed.) 547-'8; 1 Abb. U. S. Pr. 145.) And it should be observed that this priority of the plaintiff in the original bill may be lost by his amending it. (Cases *supra*.)

Where the cross-bill is filed *after answer* to the original bill, the general rule of practice in England is, not to stay proceedings in the original cause, but to allow that to proceed to a decree, staying the decree, if need be, until the cross-bill is ready to be heard. Upon occasion, also, the court will, on application, enlarge the time within which evidence in the original cause may be taken, which will to that extent stay the proceedings therein, so as to increase the chance of maturing the cross-bill for hearing. (2 Rob. Pr. (1st ed.) 319; Ramkissenseat v. Barker, 1 Atk. 21; Creswick v. Creswick, 1 Atk. 291; Aylet v. Easy, 2 Ves. Sen'r, 336; Dalton v. Carr, 16 Ves. 93; McConnico v. Moseley, 4 Call. 360.)

But in no case will the hearing of an original cause be suspended on account of a cross-bill, where that bill has been filed at an unreasonably late period, or the plaintiff in it has been guilty of needless delay in preparing it for a hearing. (2 Rob. Pr. (1st ed.) 319; McConnico v. Moseley, 4 Call. 361; Sterry v. Arden, 1 Johns. Ch. R. (N. Y.) 62; Gouverneur v. Elmendorf, 4 Johns. Ch. R. 357; White v. Fuloid, 2 Pai. (N. Y.) 164.)

The filing of a cross-bill without leave of the court is an irregularity for which the bill may be set aside. (Bronson v. La Crosse R. R. Co. 2 Wal. 303.) And it is to be observed, that as the cross-bill is auxiliary to the proceeding in the original suit, and a dependency upon it, the two constituting but one suit, it must not introduce new parties, nor new and distinct matters not embraced in the original bill; and if its purpose is different from that of the original bill, it is not a cross-bill, even though the matters presented in it have a connection with the same general subject. (Shields v. Barrow, 17 How. 145; Ayres v. Carver, 17 How. 595; Field v. Schieffelin, 7 Johns. Ch. R. (N. Y.) 252; Cross v. De Valle, 1 Wal. 14.)

2<sup>h</sup>. A Bill of Review.

A bill of review is a bill whose object it is to procure an examination and the annulling of a *final* decree made upon a former bill, after the term is ended at which the decree was pronounced. It may be brought upon *error of law* appearing in the body of the decree itself, or upon *discovery of new matter*. In the first case the decree can only be reversed upon the ground of the apparent error; as if an absolute and unconditional decree be made against a person, who *upon the face of it* appears to have been an infant. A bill of this nature may be brought without the leave of the court previously given. But if the bill seeks to reverse a decree upon discovery of some new matter, the leave of the court must be first obtained; and such leave will not be granted unless the court is satisfied, by affidavit, that the new matter could not be produced when the decree was made, and that it is relevant and material, and such as might have occasioned a different determination. (Mitf. Eq. Pl. 78 & seq; 2 Rob. Pr. (1st ed.) 389, 414; Carter v. Allan, 21 Grat. 244.)

More will be said of a bill of review, in another place. (*Post*, p. .) At present it will suffice to observe that it is in Virginia limited by statute to *three years* next after the decree; except that an infant, married woman, or insane person may exhibit the same within three years after the removal of his or her disability. (V. C. 1873, c. 175, § 5.)

3<sup>h</sup>. A Bill in the *Nature of a Bill of Review*.

A bill in the nature of a bill of review lies where a decree is made against a person who had no interest at all in the matter in dispute, or had not such an interest as was sufficient to render the decree against him binding upon some other person claiming the same or a

similar interest, and it seeks relief against that error in the decree. Thus, if a decree is made against a tenant for life only, a remainderman in fee cannot defeat the proceedings against the tenant for life, except by filing a bill of this nature, showing the error which has occurred, the incompetency in the tenant for life to sustain the suit, and the accrual of his own interest, and thereupon praying that the proceedings in the original cause may be reviewed, and for that purpose that the other party may appear to and answer this new bill, and that the rights of the parties may be properly ascertained. As such a bill as this does not seek to alter a decree made against the plaintiff himself, or against any person under whom he claims, it may be filed without the leave of the court. (Mitf. Eq. Pl. 83; Stor. Eq. Pl. § 424.)

4<sup>h</sup>. A Bill to impeach a Decree on the ground of *Fraud or Surprise*.

Where a decree has been obtained by fraud, or by surprise, *without laches* on the part of the person who complains of it, an original bill may be filed, without the leave of the court, in order to impeach such decree. The fraud or surprise in obtaining the decree being the principal point in issue, must be established by proof before the propriety of the decree can be investigated; but when it appears to have been so obtained, the court will restore the parties to their former situation, whatever their rights may be. (Mitf. Eq. Pl. 84; Stor. Eq. § 426, &c.; Callaway v. Alexander, 8 Leigh, 114, 119; Erwin v. Vint, 6 Munf. 267, 270; Anderson v. Woodford, 8 Leigh, 328; Kemp v. Squire, 1 Ves. Sen. 205.)

Besides cases of direct fraud in obtaining a decree, it seems to have been considered, that where a decree has been made against a trustee, the *cestui que trust* not being before the court, nor the trust made known; or against one who has made some conveyance or incumbrance not discovered; or where a decree has been made in favor of or against an heir, when the ancestor has in fact disposed by will of the subject-matter of the suit; the concealment of the trust, or subsequent conveyance or incumbrance, or will, in these several cases ought to be treated as a fraud—that is, the decree should be considered as having no force or effect, as against the *cestui que trust*, &c. (Mitf. Eq. Pl. 84-'5; Collins v. Loftus, 10 Leigh, 9 & seq; Com'th v. Ricks, 1 Grat. 416, 427-'8.)

A bill to set aside the decree for fraud or surprise

must state the decree, and the proceedings which led to it, with the circumstances of fraud or surprise on which it is impeached. And it may be sometimes necessary, besides the prayer for other relief adapted to the plaintiff's case, to pray for an *injunction* to prevent the enforcement of the decree. (Mitf. Eq. Pl. 85; Calloway v. Alexander, 8 Leigh, 114; Anderson v. Woodford, 8 Leigh, 328.)

5<sup>a</sup>. A bill to *Suspend or Avoid* the Execution of a Decree.

The operation of a decree has been sometimes suspended on special circumstances, or avoided by matter subsequent to the decree, upon a new bill for the purpose. Thus where a decree was made within the *Union lines*, during the late war, to foreclose a mortgage, it was held to be of no effect as to the mortgagor, if he had been forced to go, or had always been within the *Confederate lines*; and after the war a bill was permitted to be filed, to avoid the execution of the decree. (Mitf. Eq. Pl. 85; 2 Insts. Com. & Stat. Law, 321; Dean v. Nelson, 10 Wal. 172; Lasere v. Rochereau, 17 Wal. 439-'40.)

6<sup>a</sup>. A Bill to *carry a Decree into Execution*.

When, from the neglect of parties, or some other cause, it becomes impracticable to carry a decree into execution without the farther decree of the court, such a bill as this is proper. (Mitf. Eq. Pl. 86.)

In those cases, the court for the most part only enforces without varying the decree, although in some instances it has been deemed proper to examine *the law* of the decision. (Mitf. Eq. Pl. 87.)

A bill for this purpose is generally partly an original bill, and partly a bill in the nature of an original bill, though not strictly original; and sometimes it resembles a bill of revivor, or of supplement, or both. The frame of the bill is of course varied according to its nature and object. (Mitf. Eq. Pl. 87-'8.)

7<sup>a</sup>. A Bill in the *Nature of a Bill of Revivor*.

Where the death of a party, whose interest is not determined by his death, is attended with such a transmission of his interest that the title to it, as well as the person entitled, may be disputed and litigated in the court of chancery—as in the case of a *devise of real estate*,—the suit cannot be continued at common law by a bill of revivor; but an original bill must be filed, upon which the title may be litigated; and this bill will have so far the effect of a bill of revivor, that if the title of the devisee is established, the same benefit may be had

of the proceedings upon the former bill as if the suit had been continued by a bill of revivor. (Mitf. Eq. Pl. 66-'7, 88.)

A bill for this purpose must state the original bill, the proceedings upon it, the abatement, and the manner in which the interest of the party dead has been transmitted; and it must charge the validity of the transmission, and state the rights which have accrued by it. The bill is said to be *original* merely by reason of the want of that privity of title between the party to the former and the party to the latter bill, (though claiming the interest,) as would have permitted the continuance of the suit by bill of revivor. Hence, when the validity of the alleged transmission of interest (*e. g.* by devise) is established, the party to the new bill is equally bound by, and has equal advantage of, the proceedings on the original bill, as if there had been such a privity between him and the party to the original bill claiming the same interest, as in respect to the commencement of proceedings, the application of the statute of limitations, &c. (Mitf. Eq. Pl. 88-'9; *Ante*, p. 1133.)

The statute in Virginia, before referred to, (*Ante*, p. 1133; V. C. 1873, c. 169, § 4 to 6,) includes within its scope, not only the cases when at common law a *bill of revivor* was proper, but those also when by that law a *bill in the nature of a bill of revivor* was resorted to. Thus, it is enacted in substance that—

If a *plaintiff* in equity dies, or his powers as a personal representative, or as committee of a person non-sane or convict, cease; or if he becomes insane or convict of felony, or being a female, such plaintiff marries, the party succeeding to his or her rights, by virtue of being the personal representative, heir or *devisee* of a decedent, or the committee of a non-sane person, or a convict, or the husband of a female, may introduce himself into the cause, either by writ of *scire facias*, or by a simple motion, without notice or *scire facias*. And the defendant may introduce such successor to the plaintiff by means of a writ of *scire facias*, but not by motion. (V. C. 1873, c. 169, § 4.)

If any of the occurrences above named befall a *defendant*, the proper successor to his or her rights, whether as personal representative, heir, or *devisee*, or as the committee of one non-sane, or convict, or as husband to a female, is introduced into the cause only by a writ of *scire facias*, and not by motion. But when the defendant is one whose powers as personal repre-



sentative, &c., have ceased, the plaintiff may continue his suit against him to *final decree*. He cannot, however, proceed against him and his successor too, upon his *previous bill*, unless an order that the suit proceed against the *former party* be entered at the first term after service of a *scire facias* for or against such successor. (V. C. 1873, c. 169, § 4, 6.)

The writ of *scire facias* may be sued out at any stage of the cause, and may be issued by the clerk of the court in which the case is, *at any time*; and an order to proceed in the name of the proper party may be entered *at rules*, although the case be *on the court docket*. (V. C. 1873, c. 169, § 4, 5.)

And where in any suit in equity the number of parties exceeds *thirty*, and any one of them jointly interested with others *dies or marries*, the court in its discretion may nevertheless proceed, if in its opinion *all classes of interests* in the case are represented, and no one will be prejudiced by the trial of the cause. (V. C. 1873, c. 169, § 9.)

If the party to be substituted for the plaintiff or appellant does not move to substitute, or apply for a *scire facias*, at or before the second term of the court next after that at which there has been made on the record a suggestion of the fact making revival proper, the suit of the plaintiff or appellant shall be discontinued, unless good cause be shown to the contrary. (V. C. 1873, c. 169, § 7.)

8<sup>b</sup>. A Bill in the *Nature of a Supplemental Bill*.

Where the interest of a plaintiff or defendant, suing or defending in his own right, wholly determines, and the same property becomes vested in another person, not claiming under him, as in the case of a *remainderman* in a settlement becoming entitled upon the death of a prior tenant for life under the same settlement, the suit cannot be continued by a bill of revivor, and its defects cannot be supplied by a supplemental bill; but by an *original bill in the nature of a supplemental bill*, the benefit of the former proceedings may generally be obtained. (Mist. Eq. Pl. 67 & seq. 89-90.)

A bill for this purpose must state the original bill, the proceedings upon it, the event which has determined the interest of the party by or against whom the former bill was exhibited, and the manner in which the property has vested in the new party. It must then show the ground upon which the court ought to grant the benefit of the former suit to or against the new party thus become entitled to the subject, and pray

the decree of the court adapted to the case of the plaintiff in the new bill. (Mitf. Eq. Pl. 90.)

This bill, though partaking of the nature of a supplemental bill, is not *an addition* to the original bill, but *another* original bill, which, in its consequences, may in a measure draw to itself the advantage of the proceedings on the former bill. (Mitf. Eq. Pl. 90.)

There is this difference between an original bill in the *nature of a bill of revivor*, and an original bill in the *nature of a supplemental bill*. Upon the first the benefit of the former proceeding is absolutely obtained, so that the pleadings in the first cause, and the depositions of witnesses, if any, may be used in the same manner as if filed or taken in the second cause; and if any decree has been made in the first cause, the same decree is to be made in the second. But in the latter case, a new defence may be made to the second cause; the pleadings and depositions in the first cause cannot be used therein; and the decree, if any, has been obtained, is no otherwise of advantage than as it may be an inducement to the court to make a similar decree. (Mitf. Eq. Pl. 68; Anon. 1 Atk. 88-'9; Anon. Id. 263, n (1); Clare v. Wordell, 2 Vern. 548; Minshull v. Ld. Mohun, Id. 672; Coke v. Fountain, 1 Vern. 413.)

### 3<sup>d</sup>. The Frame of a Bill in Chancery.

The frame of a bill in chancery might very readily be understood by a careful study of the several parts of which it consists, as set forth *Ante*, p. 1122 & seq. But in order to make it still more obvious, an example of a bill is subjoined, such as might be filed in the case formerly proposed as the basis of this exposition. (*Ante*, p. 1110-'11.) Such a bill might be as follows:

#### BILL IN CHANCERY.

*Address to Ch'r.* To the Honorable H. S., Judge of the circuit court of A. county:

*Name and residence of Complainant.* Your orator, James Hart, of the said county of A., humbly complaining, sheweth to your honor,

*Stating part.* That his father, Thomas Hart, late of the same county, on or about the — day of —, in the year —, departed this life, seised and possessed of a large real and personal estate, leaving a widow, Jane, and four children, to wit: your orator, John, Mary the wife of Henry Wells, and Anne, then and now an infant under the age of twenty-one years, him surviving.

The said Thomas Hart, in his lifetime, to-wit: on or about the — day of —, in the year —, duly made his last will and testament, according to law, whereby he charged his whole estate with the payment of his debts, and subject thereto, bequeathed to your orator, as a specific legacy, his four blooded mares, of the

value of \$6,000, in addition to your orator's equal share in the residue of what the said Thomas should die seised and possessed of; but made no other disposition of his large and valuable property, and appointed no executor of his will.

The said Jane, the widow of the said Thomas, shortly after the said Thomas' death, caused his said will to be duly admitted to probate in the county court of the said county of A., and at the same time by the appointment of the said court, qualified according to law, as the administratrix with the will annexed of her said husband, and proceeded to take possession of and administer his estate. An office-copy of the said will, with the certificate of probate and grant of letters of administration with the will annexed, (marked A), are herewith exhibited as part of this bill.

Your orator charges that upon her said qualification as administratrix with the will annexed, of the said Thomas Hart, the said Jane took possession of all the said decedent's personal estate, made and returned an inventory thereof, which was duly recorded, an office copy of which (marked B.) is herewith exhibited as part of this bill, and has ever since continued in possession thereof, and has also continued to hold and enjoy the whole real estate of which the said Thomas was seised at his death, consisting of a tract of land called Fairfield, containing eighteen hundred acres, lying in the county of A, and adjacent to the lands of Hugh Royster, John Swift, and others. Your orator further charges that the debts of the decedent, his father, have long since been paid, and that no reason exists why the administration of his estate should not ere this have been closed. Yet the said Jane has not delivered to your orator the specific legacy of the blooded mares bequeathed to him by his father's will, nor made any distribution of the personalty in her hands as administratrix with the will annexed, of the said Thomas, nor has she at any time since her qualification once settled the accounts of her administration. And so, in a like unjust spirit, although ever since the death of the said Thomas, she has been in the occupancy and enjoyment of the valuable and productive real estate of which he died seised, and taken the profits thereof to her own use, yet she has never paid any portion of such profits to your orator and the other co-heirs of the said Thomas, nor has she ever offered to make partition of the land amongst the said heirs, although the said heirs were always willing and anxious that such partition should be made, and her dower assigned to the said Jane. Your orator is further informed, believes, and charges that, so far from preparing to deliver to your orator his said specific legacy, and to make distribution of the large surplus which he avers to be in her hands as administratrix with the will annexed, of his said deceased father, the said Jane is at the present time actually proposing, threatening, and contriving to sell the four blooded mares above mentioned, which were specifically bequeathed to your orator, as aforesaid, by his father's will, and are of very great and pecoliar value, having to your orator a *pretium affectionis*, not only because they were great favorites with his father, but because he himself bestowed much pains and care in raising and training them. And your orator is also informed, believes, and charges,

that the person to whom the said Jane proposes and expects to sell the said mares is a citizen and resident of the State of California, and if he buys them will cause them to be immediately removed thither, or to some other remote place beyond the limits of this commonwealth.

*Pretended defence anticipated.*

This sale of the said blooded mares, the said Jane proposes and threatens to make, sometimes under the pretext—which your orator avers to be untrue—that money is wanted to pay debts due from the estate of the said Thomas Hart, and at other times under the pretence, equally unfounded, that the chattels in question are part of her distributive share of her decedent's personal estate.

*Assurances to give color to the jurisdiction of equity.*

Forasmuch, therefore, as these doings are contrary to equity and good conscience, and as your orator is remediless, save in a court of chancery, where matters of this sort are properly cognizable, your orator prays that the said Jane, widow and relict of the

*Prayer that defendants may answer.*

said Thomas Hart, deceased, the same Jane, as administratrix with the will annexed, of the said Thomas, John Hart, Henry Wells, and Mary his wife, who was formerly Mary Hart, and Anne Hart, may be made parties defendant to this bill, and be required severally to answer the same on oath, as fully and particularly as

*Special interrogatories.*

if each of them had been thereto specially interrogated; and particularly that the said Jane may say whether all the debts of her said decedent, Thomas Hart, have not been paid; whether there is not in her hands, as administratrix with the will annexed of the said Thomas, a large surplus of the personal estate of the said decedent, distributable amongst his distributees, and how much; whether she cannot properly and safely assent to, and deliver to your orator the specific legacy aforesaid; whether she does not propose and intend to sell the said blooded mares, or one or more of them, and which of them, and their respective values; and whether she has not been always since the decedent's death in the occupancy and enjoyment of the lands whereof he died seised, and appropriated to her own use the whole or some part of the rents and profits thereof, and how much; and that a guardian *ad litem* may be assigned by the court to the infant defendant Anne, in order to defend her in this suit.

*Appointment of guardian ad litem.*

*Prayer for relief.*

And your orator further prays that the said Jane may be required to render before one of the commissioners of this court a full,

*For account of admin'n.*

true and perfect account of her actings and doings as administratrix with the will annexed of the said Thomas Hart, deceased;

*For injunction to removal of mares.*

that she be enjoined from selling, parting with, or removing from the commonwealth, or permitting to be so sold, parted with, or removed, any or either of the said blooded mares, so as aforesaid specifically bequeathed by the said Thomas Hart, deceased, to your

*For delivery of legacy.*

orator; that she be decreed to deliver the said mares, and each of them, to your orator, and account for the increase and profits thereof

*For distribution.*

since the death of the said Thomas; that distribution be decreed to be made amongst the distributees of the said Thomas Hart, deceased, of the surplus personal estate of the said Thomas in the hands of the said Jane, as administratrix with the will annexed, of

*For assignment of dower.*

the said Thomas, ascertained to be distributable; that dower be assigned to the said Jane in the tract of land aforesaid, called Fair-

*For accounts  
of profits of  
lands.*

*For partition  
of the lands.*

*For general re-  
lief.*

*Prayer for  
process.*

field, whereof the said Thomas was seised of an estate of inheritance during the coverture of the said Jane with him, and whereof he died seised; that the said Jane be required to account for the rents and profits of the said lands since the death of the said Thomas, during her occupancy and enjoyment of them; and that equal partition of the remaining two-thirds of the said tract of land amongst the children and heirs of the said Thomas be decreed to be made. And that such other and further relief may be granted to your orator as is adapted to the nature of his case, and agreeable to equity and good conscience. And may a summons issue against the several defendants hereinbefore named, &c. And your orator will ever pray, &c.

G. R. C. A., p. q.

Virginia:

A county to wit:

This day James Hart appeared in person before me, a justice of the peace, in and for the county and State aforesaid, and made oath that the matters in the foregoing bill stated as of his own knowledge are true, and those stated upon the information of others he believes to be true.

Given under my hand this — day of —, in the year —.

R. W., J. P.

Bills must always be signed by counsel, (*Ante*, p. 1126), but are not usually verified by affidavit. When they ask for special and *ex parte* orders, however, such as an injunction, as in this case, or an interpleader, &c., or when they ask for a *discovery*, as the only ground of equity cognizance, an affidavit is always required. (Mitf. Eq. Pl. 49, 51, 131; Stor. Eq. Pl. § 288, 313, 477; Coop. Eq. Pl. 49, 150; Sands' Suit in Eq. 25 (§ 62), 316.) And in all cases of *injunction*, this wholesome rule is enforced in Virginia by statute. "No injunction shall be awarded in vacation, nor in court, in a case *not ready for hearing*, unless the court or judge be satisfied, *by affidavit or otherwise*, of the plaintiff's equity." (V. C. 1873, c. 175, § 5.) In the United States courts a similar result is obtained by requiring *notice* to the adversary of the application. (1 Abb. U. S. Pr. 141.)

In cases of injunction the court, or judge in vacation, either makes a special order on the subject, or directs a provisional writ of injunction to be issued. With us it is not usual to issue a formal writ of injunction, but merely to endorse on the *subpœna*, or summons which institutes the suit, a copy of the special order of injunction made by the court or judge. (Rob. Forms, 37.)

The order of injunction, if awarded in court, is contained in the minutes of the court's proceedings, and thence the copy is transcribed on the back of the *subpœna* or summons. If it is awarded by the judge in vacation, it is usually endorsed by him on the bill, the order being

addressed to the clerk of the court, who is thereby authorized to transfer its substance at least, to the *subpœna* or summons. In the case set forth by the foregoing bill, the order of injunction might be as follows :

ORDER OF INJUNCTION FROM A JUDGE IN VACATION.

Upon the complainant, James Hart's entering into and acknowledging a bond, with good security, in the clerk's office of the circuit court of A. county, before the clerk of said court, in the penalty of ——— dollars, conditioned to pay all costs and damages which shall be awarded against him in case the injunction herein mentioned shall be dissolved, an injunction is granted in pursuance of the prayer of the bill within contained, to restrain and prohibit the within-named Jane Hart, whether in her own right, or as administratrix with the will annexed, of Thos. Hart, deceased, and her agents and servants from selling, parting with, or removing from the commonwealth, or permitting to be so sold, parted with, or removed, any or either of the blooded mares in the bill mentioned, until the further order of the court.

(Signed)

H. S., Judge.

To the clerk of the circuit court  
for the county of A.

2°. The *Defence* by the Defendant.

The defence to a bill in chancery may be made in various forms according to the foundation on which it is based, and the extent to which it submits to the judgment of the court. If it rests on the bill, and on the foundation of matter there apparent, demands the judgment of the court whether the suit shall proceed at all, it is termed a *demurrer*. If on the foundation of new matter offered, it demands the judgment of the court whether the defendant shall be compelled to answer further, it assumes a different form, and is termed a *plea*. If the defendant disclaims all interest in the matters propounded in the bill, it is denominated a *disclaimer*. And if it submits to answer generally the charges in the bill, demanding the judgment of the court on the whole case made on both sides, it is simply called an *answer*. Let us, therefore, examine with some attention, these several forms of defence, namely, (1), Demurrer; (2), Plea; (3), Disclaimer; and (4), Answer, observing that all or any of them may be used together, if applying to *distinct parts* of the bill; and that in Virginia, by analogy to proceedings at law, where the defendant is admitted to plead as many several matters, whether of law or fact, as he shall think necessary, (V. C. 1873, c. 167, § 24), a plea or answer, even to the same matter, does not over-rule a demurrer. (Mitf. Eq. Pl. 14, 97-'8; Bassett v. Cunningham, 7 Leigh, 406);  
W. C.

1°. Defence by *Demurrer*.

A demurrer admits the truth of the facts contained in the bill, or in the part of the bill to which it extends, (as, it will be remembered, is the rule in an action at law—*Ante*, p. 892 & seq.) and therefore, as no fact can be in question between the parties whilst the demurrer is pending, the court may immediately proceed to pronounce its definitive judgment, which, if favorable to the defendant, in the absence of a plea filed along with the demurrer, puts an end to so much of the suit as the demurrer extends to, although when the court has signified its opinion to overrule the demurrer, it may be withdrawn, and a plea or answer filed, as we have seen is the practice at law. Indeed, it is the practice with us not to pronounce a decree in any case, but to give the defendant leave to file an answer. (Mitf. Eq. Pl. 14; *N. W. Bank v. Nelson*, 1 Grat. 127; *Sutton v. Gatewood*, 6 Munf. 398; *Ante*, p. 893.)

The principal ends of a demurrer, which it will be observed is founded exclusively upon grounds *apparent on the face of the bill, or of the documents filed therewith*, and not upon any foreign or extrinsic matter alleged by the defendant, are to avoid a discovery which may be prejudicial to the defendant, as by subjecting him to a fine, forfeiture, or penalty, to cover a defective title, or to prevent unnecessary expense. (Mitf. Eq. Pl. 100; 2 Rob. Pr. (1st ed.) 274 & seq, 300 & seq; *Young v. Scott*, 4 Rand. 416; *N. W. Bank v. Nelson*, 1 Grat. 126; *Young v. McChesney*, 9 Grat. 336; *Towner v. Lucas*, 13 Grat. 705.) If no one of these ends is attained, there is little use in a demurrer. For, in general, if a demurrer would hold to a bill, the court, though the defendant answers, will not grant relief upon hearing the cause. And if there be any exception to this doctrine, it is too rare to demand notice here. (Mitf. Eq. Pl. 100; *North v. Earl of Strafford*, 3 P. Wms. 150; *Pickering's Case*, 12 Mod. 171; *Henderson v. Lightfoot*, 5 Call. 241.)

If a bill be good in part, a demurrer to the whole must be overruled, notwithstanding a part be bad, which is the doctrine also, as the student will remember, in an action at law. (*Ante*, p. 895; 2 Rob. Pr. (1st ed.) 301; *Castleman v. Veitch*, 3 Rand. 601; *Le Roy v. Veeder*, 1 Johns. Cas. (N. Y.) 423, 434; *Verplonck v. Caines*, 1 Johns. Ch. R. (N. Y.) 467; *Kimberley v. Sells*, 3 Do. 467; *Livingston v. Livingston*, 4 Do. 294; *Higginbotham v. Burnet*, 5 Do. 184; *Laight v. Morgan*, 2 Cal. Cas. in Ev. (N. Y.) 347.)

The student is desired now to direct his attention to,

- (1), The grounds of demurrer to bills in chancery; and
  - (2), The frame and structure of such demurrers;
- W. C.

1<sup>s</sup>. The Grounds of Demurrer to Bills in Chancery.

It will be remembered that original bills are divided into (1), Bills praying relief; and (2), Bills not praying relief, namely, bills of discovery merely, and bills to perpetuate testimony. (*Ante*, p. 1126, 1128.) The grounds of demurrer to an original bill are therefore various, according to this classification, and will be presented accordingly. And there will be added, (3), The grounds of demurrer to bills *not original*;

W. C.

1<sup>h</sup>. Grounds of Demurrer to *Original Bills praying Relief*.

The grounds of demurrer to original bills praying relief are enumerated as follows: (Mitf. Eq. Pl. 102,)—being always such as are apparent on the face of the bill, and the documents filed therewith as part thereof; namely:

- (1), That the subject of the suit is *not within the jurisdiction of the court of equity*

We have seen already the classifications, according to several of the best authorities, of the subjects of equity-cognizance, and to those classifications reference must now be had. (*Ante*, p. 1104 & seq.) If the subject of the suit in question does not come within those categories, a demurrer lies. (Mitf. Eq. Pl. 102, 103 & seq.)

- (2), That *some other court of equity* has the proper jurisdiction.

With us in Virginia, the objection to the jurisdiction on this ground can be *territorial* only; that is, that the suit has been instituted in the wrong county or corporation. The criterion of territorial jurisdiction has been already set forth (*Ante*, p. 1113 & seq.) We have there seen that if the want of jurisdiction *appears on the face of the bill*, advantage of the error may be taken by demurrer, or without a demurrer, at the hearing, or even in an appellate court; but if it *does not so appear*, the objection must be taken at the time of the filing of the bill, by a *plea to the jurisdiction*, (which the statute inadvertently styles a *plea in abatement*.) and not otherwise. (*Ante*, p. 1114-'15; 2 Rob. Pr. (1st ed.) 297.)

- (3), That the *plaintiff is not entitled to sue* by reason of *some personal disability*.

Thus, if it appear upon the *face of the bill*, that the person exhibiting it is an infant or a married woman, an idiot or a lunatic, and no next friend, or committee be



named in the bill, the defendant may demur. But if the incapacity does not appear upon the face of the bill, the defendant must take advantage of it by plea in abatement. (Mitf. Eq. Pl. 102, 135.)

(4), That the *plaintiff*, or any one of several plaintiffs, *has no interest in the subject*, or no title to institute a suit concerning it.

If the bill itself, or the documents vouched by and filed with it, do not show a right in the thing demanded, and proper title to institute a suit concerning it, on the part of each and every plaintiff, the defendant may demur. Thus, if a plaintiff claims under a will, and it is apparent upon the construction of the will that he has no title; or if a party claim by virtue of a grant of letters of administration *in a foreign court*, to have an account of a decedent's estate; in both these cases a demurrer is proper; in the first, because the plaintiff shows no right to the subject, and in the last, because he shows no title to institute a suit, a foreign administration not being noticed in our courts. (Mitf. Eq. Pl. 102, 136 & seq; Morrison v. Grubb, 23 Grat. 346.) And so if there are several plaintiffs, and it appears from the bill that any one or more of them has no right to, or interest in the subject, a demurrer lies, although if the objection be not made by demurrer, plea or answer, it is not available at the hearing. (Raffety v. King, 1 Keen, (15 Eng. Ch. R.) 619; Livingston v. Woodworth, 15 How. 557; Dickenson v. Davis, 2 Leigh, 407; Vaiden v. Stubblefield, 28 Grat. 157-'8.)

(5), That the *plaintiff*, or some one of several plaintiffs, *has no right to call on the defendant concerning the subject of the suit*.

A plaintiff may have an interest in the subject of his suit, and a right to institute against somebody a suit concerning it, and yet, for want of *privity* between the defendant and himself, may have no right to *call on the defendant* to answer his demand. Thus, though an unsatisfied legatee has an interest in the estate of his testator, and a right to have it applied to answer his demand, in a due course of administration; yet he has no right to institute a suit against the *debtors* to the testator's estate in order to compel them to pay their debts in satisfaction of his legacy. For there is no privity between the legatee and the debtors, who are answerable only to the personal representative of the testator; unless by collusion between such representative and the debtors, or other collateral circumstances, a distinct

ground is given for a bill by the legatee against the debtors. (Mitf. Eq. Pl. 102, 141.)

(6), That the *defendant has not that interest in the subject* which can *make him liable* to the claims of the plaintiff.

If the bill does not show some claim of interest in the defendant in the subject of the suit, which can make him liable to the plaintiff's demand, the defendant may demur. Hence, if a bill is filed to have the benefit of, or to impeach an award, and the arbitrators are made parties, they may demur to the whole bill, as well to discovery as relief; for the plaintiff can have no decree against them, nor can he read their answer against the other defendants. However, if the award be impeached on account of the *gross misconduct* of the arbitrators, and they are made parties to the suit, it seems the better opinion that no demurrer lies; for they have in such cases been repeatedly ordered to pay the costs of the suit. (Mitf. Eq. Pl. 102, 142; *Shermer v. Beale*, 1 Wash. 14; *Chicot v. Lequesne*, 2 Ves. Sen'r, 318; *Lingood v. Croucher*, 2 Atk. 396.) And so, although the bill shows that the defendant has *an interest* in the subject, yet if it does not also appear that he is liable to the plaintiff's demand, a demurrer must be allowed. Thus, where a bill is brought by a lessor against an assignee, touching a breach of covenant in a lease, and the covenant as stated in the bill appears to be *collateral*, and not *running with the land*, and, therefore, not inherently binding on assigns, and is not by the bill expressly stated to bind assigns, upon demurrer by the assignee, the demurrer was sustained. (Mitf. Eq. Pl. 143-'4; *Ld. Uxbridge v. Staveland*, 1 Ves. Sen. 56.)

(7), That for some *reason founded on the substance of the case*, the plaintiff is not entitled to the relief he prays.

Many of the grounds of demurrer already mentioned are perhaps referrible to this head; and wherever the case stated is such that, admitting the whole bill to be true, the court ought not to give the plaintiff the relief or assistance he asks in whole or part, the defect thus appearing on the face of the bill, whether it arises from the want of merit in the case itself, or from the imperfect statement of it, is sufficient ground for a demurrer. (Mitf. Eq. Pl. 102, 144; *Fowler v. Saunders*, 4 Call. 361.)

(8), The deficiency of the bill *to answer the purpose of complete justice*.

The principal deficiency of this sort, and that which most frequently occurs, is the *want of proper parties*. It is the constant aim of a court of equity to do com-

plete justice by deciding upon and settling the rights of all persons interested in the subject of the suit, to make the performance of the order of the court perfectly safe to those who are compelled to obey it, and to prevent future litigation. For this purpose all persons materially interested in the subject ought to be parties to the suit, plaintiffs or defendants, however numerous they may be, so that a complete decree may be made between those parties. In some cases, as in the instance of creditors seeking an account of the estate of their deceased debtor, for payment of their demands, a few suing *on behalf of the rest*, as well as of themselves, may substantiate the suit, and the other creditors may come in under the decree. So it is also in the case of a bill filed to set aside a conveyance alleged to be fraudulent, and to distribute the fund thence arising amongst an insolvent's creditors; or of a bill filed to have an account on behalf of a ship's crew, of captures made by it, and their proceeds; or when the proprietors or shareholders of a public work, consisting of a great number of persons, are concerned. Indeed, wherever the rule obliging all persons interested to be parties is from their number impracticable, or extremely difficult, it is so far dispensed with, or rather modified, as to require only sufficient parties to secure a fair contest, by representing all the separate interests. (Mitf. Eq. Pl. 144 & seq; Stor. Eq. Pl. § 395 & seq. 75; Leigh v. Thomas, 2 Ves. Sen. 312-'13; Adair v. New Riv. Co. 11 Ves. 443; Cockburn v. Thompson, 16 Ves. 326; Good v. Blewit, 13 Ves. 397; Reynolds v. Bank of Vir'g. 6 Grat. 174; Billups v. Sears, 5 Grat. 31; Bull v. Read, 13 Grat. 86; Johnson v. Drummond, 20 Grat. 428; Sexton v. Crockett, 23 Grat. 869; Clough v. Thompson, 7 Grat. 26; Tiffany v. Kent. 2 Grat. 231; Clark v. Long, 4 Rand. 451.) But where a husband sues alone for a legacy given to his wife, or one distributee or legatee sues without making all other distributees or legatees parties, as well as the decedent's personal representative; or where one joint tenant sues without the other; or a bill is brought to subject the lands of a decedent to a debt, where the personal estate is first answerable therefor, without making the personal representative a defendant; and in many other like cases the want of proper parties is a good cause of demurrer. (Mitf. Eq. Pl. 145; Stor. Eq. Pl. § 159 & seq; Sexton v. Crockett, 23 Grat. 869.)

Additional exceptions to the general rule that all persons interested must be made parties to a bill in equity,—all, however, dependent on the same general

principle of convenient adoption in the administration of justice,—will be found stated by Judge Story in Stor. Eq. Pl. § 77 & seq.

In Virginia special provision is made by statute for several cases which, in this connection, are worthy of attentive observance, namely, that

(1), Where, in any suit in equity, the bill states that the names of any persons interested in a subject *to be divided or disposed of* are *unknown*, of which affidavit is made; or,

(2), Where, in any suit in equity, the number of defendants upon whom process has been executed *exceeds thirty*, and it appears *to the court*, by the bill or other pleading or exhibits filed, that the parties before the court *represent like interests* as those not served with process, an *order of publication* may be entered against the latter, as also against the parties unknown in the first case. (*Ante*, p. 536; V. C. 1873, c. 166, § 10; Acts 1876-'7, p. 274, c. 264); and

(3), Where, in any suit in equity, the number of parties *exceeds thirty*, and any one of said parties jointly interested with others in any question arising therein shall die or marry, the court may nevertheless proceed, if in its opinion *all classes of interests in the case are represented*, and the interests of no one *will be prejudiced by the trial* of the cause, to render a decree in such suit as if such person were alive or had not married; decreeing to the heirs at law, distributees, or representatives of such person (as the case may require), such interest as such person would have been entitled to had such person been alive, or as if such person had not married during the pendency of the suit; reserving, however, to persons thus decreed against the same time to petition to have the cause reheard as is allowed by V. C. 1873, c. 166, § 16, in the case of orders of publication. (V. C. 1873, c. 169, § 9, 10; *Ante*, p. 538.)

(9), The *Confounding of Distinct Subjects* in the same Bill, or of *unnecessarily multiplying suits*.

To demand by *one bill* several matters of different natures against several defendants, tends to load each defendant with an unnecessary burden of costs, by swelling the pleadings with the state of the several claims of the other defendants with which he has no connection; and for this cause, therefore, either defendant may demur. But if a combination or conspiracy amongst the several defendants is charged by the bill, the defendant demurring must, it is said, so far answer the bill as to deny the combination; but if the answer goes farther

than this, it will, at common law, overrule the demurrer. (Mitf. Eq. Pl. 102, 147.)

A demurrer for this cause holds only where the plaintiff claims several matters of *different natures*; but when one general right is claimed for the plaintiff by the bill, though the *defendants* have separate and distinct rights, a demurrer is not available. As where a person claiming the exclusive right to fish in a river, filed a bill against several riparian proprietors who claimed the right to fish opposite their respective lands, thereby coming in conflict with the exclusive right insisted on by the plaintiff. (Mitf. Eq. Pl. 147.)

2<sup>d</sup>. Grounds of Demurrer to *Original Bills not Praying Relief*.

Bills for the sole purpose of obtaining a discovery, or of perpetuating the testimony of witnesses, and asking no relief, have never been frequent in Virginia, and since the statutory provisions formerly referred to, (*Ante* p. 1128, & seq; V. C. 1873, c. 172, § 34, 36, 40, 21, 22; Acts, 1876-'7, p. 184, c. 198), have become practically almost useless, if not wholly so. It will, therefore, be quite sufficient to enumerate the grounds of demurrer to such bills, without dwelling upon them. (Mitf. Eq. Pl. 149 & seq; Stor. Eq. Pl. § 545 & seq):

(1), That the case made by the bill is not one in which a court of equity assumes a jurisdiction to compel a discovery. (Mitf. Eq. Pl. 149 & seq; Stor. Eq. Pl. § 551 & seq.)

(2), That the plaintiff has no interest in the subject, or no interest which entitles him to call on the defendant for a discovery. (Mitf. Eq. Pl. 149 151, & seq; Stor. Eq. Pl. § 571.)

(3), That the defendant has no interest in the subject to entitle the plaintiff to institute a suit against him, even for the purpose of discovery. (Mitf. Eq. Pl. 149, 152 & seq; Stor. Eq. Pl. § 570.)

(4), That, although plaintiff and defendant may have an interest in the subject, yet there is not that *privity of title between them* which gives the plaintiff a right to the discovery demanded by the bill. (Mitf. Eq. Pl. 149, 154; Stor. Eq. Pl. § 572 & seq.)

(5), That the discovery, if obtained, cannot be material. (Mitf. Eq. Pl. 149, 154.)

(6), That the situation of the defendant renders it improper for a court of equity to compel a discovery, because it would *tend to subject him to penalties, &c.* (Mitf. Eq. Pl. 149, 157 & seq; Stor. Eq. Pl. § 575 & seq.)

3<sup>d</sup>. Grounds of Demurrer to *Bills not Original*.

As every other kind of bill is a consequence of an original bill, many of the causes of demurrer which will apply to an original bill will also apply to every kind; but the peculiar form and object of each kind afford distinct causes of demurrer to each. These topics, however, cannot be dwelt upon here. The student must seek them in the several treatises upon the subject of equity pleading. (Mitf. Eq. Pl. 164 & seq; Coop. Eq. Pl. 210 & seq; Stor. Eq. Pl. § 611 & seq.)

2<sup>d</sup>. The Frame and Structure of Demurrers to Bills in Chancery.

A demurrer must be signed by counsel; but it is put in without oath, as it asserts no fact, and relies merely upon matter apparent upon the face of the bill, which it *admits to be true*, at least as far as the demurrer extends. Hence the custom of causing a demurrer always to begin with a *protestation* against the truth of the matters contained in the bill; a practice derived from the common law courts, (*Ante*, p. 616, 913-'14,) and probably intended, as in those courts, to avoid being concluded in *another suit*. (Mitf. Eq. Pl. 170, 172-'3.)

A demurrer ought, independently of statute, to set forth the several causes of demurrer; and if it does not go to the whole bill, must show clearly the particular parts demurred to. And the plaintiff, if he apprehends the demurrer to be well-founded, may obtain leave, before it is determined,—or rather before the end of the term at which it is determined,—to amend his bill. A demurrer on *matter of form* is no bar to a new bill; but if the substantial merits of the question are determined upon the demurrer, the decision may be pleaded in bar of another suit. (Mitf. Eq. Pl. 173-'4.)

A form of demurrer is subjoined, such as might be employed in the case supposed, *Ante*, p. 1110-'11, &c.

FORM OF DEMURRER TO BILL IN CHANCERY.

Mitf. Eq. Pl. 99, 170; Sands' Suit in Eq. 46-'7.

*Caption.*

The separate demurrer of Jane Hart, in her own right, and also as administratrix with the will annexed of Thomas Hart deceased, to a bill of complaint exhibited against her and others, in chancery, in the circuit court of the county of A, by James Hart.

*Protestation.*

The said defendant, by protestation not confessing or acknowledging all or any of the matters in and by the said bill set forth and complained of, to be true in manner and form as the same are therein set forth and alleged, says that she is advised that there is no matter or thing in the complainant's said bill contained good and sufficient in law to call this defendant to account in this court for the same; and she does demur thereto accordingly, and for

*General allegation that bill is demurrable.*

*Cause of demurrer specified.*—cause of demurrer says that the said bill, if the same were true, which this defendant does in no wise admit, contains not *any matter of equity* whereon this court can ground any decree, or give the complainant any relief or assistance, as against this defendant. Wherefore, and for divers errors and defects in the said bill of complaint contained, and appearing on the face thereof, the said defendant does as aforesaid demur in law thereto, and does humbly crave the judgment of this court, whether she can be compelled or ought to make any answer thereunto otherwise than as aforesaid. And this defendant humbly prays to be hence dismissed with her costs and charges in this behalf most wrongfully sustained.

*Judgment craved.*  
*Conclusion.*

(Signed.)      W., p. d.

But it should be observed that by statute in Virginia, a demurrer in equity, as in an action at law, may be in the form prescribed by the act of Assembly, as may be the joinder also,—“The defendant (or plaintiff,) says that the bill (or plea, &c.) is not (or is) sufficient in law.” (V. C. 1873, c. 167, § 30; Id. c. 179, § 1; Jones v. Clark, 25 Grat. 675.)

## 2<sup>d</sup>. Defence to a Bill in Chancery by *Plea*.

As a demurrer is the proper mode of defence to a bill, where the objection is apparent upon the bill itself, or the documents filed with it, so where the objection is not so apparent, it must be shown to the court, either by answer or by plea, which latter is described as “a special answer, showing or relying upon one or more things as a cause why the suit should be either dismissed, delayed, or barred.” (2 Dan. Ch. Pr. 677 & seq.)

The defence to which a plea is applicable is such as reduces the cause, or some part of it, to a single point, and from thence creates a bar or other obstruction to the suit, at least as to the point to which the plea applies. It is not, however, necessary that it should consist of a single fact. It may embrace a variety of circumstances, if they all *tend to one point*. The true end of a plea is to save the party from the necessity of *making a discovery* which may be adverse to his interests, and from the expense of an examination of the witnesses at large, or of adjusting accounts. And as it is manifest that the latter of these objects is only attained where the defence consists of but one sharply defined point, so in general it is only then that, in practice, a plea is preferred to an answer; unless indeed when it is specially important to avoid a *discovery*, in which case a plea is the most eligible mode of making the defence. (2 Dan. Ch. Pr. 677 & seq; Stor. Eq. § 652 & seq.)

Let us inquire, (1), What objections are proper to be presented by plea; (2), The nature of pleas in general;

(3), The form and structure of pleas; (4), The manner in which they are offered to the court; and (5), The manner in which their validity is tested;

W. C.

1<sup>s</sup>. The Objections which *it is proper to present by Plea.*

It will be found convenient to pursue the same general order in treating of pleas, as has been already used in treating of demurrers. Let us, therefore, discriminate between original bills, bills not original, and bills in the nature of original bills; and then between original bills asking relief, and original bills not asking relief; and note the grounds for a plea in each case. We are to observe, then, the grounds for a plea in reference to, (1), Original bills; (2), Bills not original; and (3), Bills in the nature of original bills;

W. C.

1<sup>h</sup>. The Objections which can be taken Advantage of by Plea *in the case of Original Bills.*

The objections which can be taken advantage of by plea in the case of original bills are very similar, whether the bills do or do not ask relief; but it is expedient to advert separately to the case of (1), Original bills asking relief; and (2), Original bills not asking relief;

W. C.

1<sup>i</sup>. The Objections which can be taken Advantage of by Plea, *in the case of Original Bills asking Relief.*

The objections to the relief sought by an original bill, which can be taken advantage of by plea, are nearly the same as those which may be the subject of demurrer, only rather more numerous, because a demurrer can extend to such only as may appear on the bill itself; whereas a plea proceeds on other extrinsic matters.

The principal grounds for a plea to an original bill seeking relief are the following, namely:

(1), That the subject of the suit is not within the jurisdiction of a court of equity; (2), That some other court of equity has the proper jurisdiction; (3), That the plaintiff is not entitled to sue by reason of some personal disability; (4), That the plaintiff is not the person he pretends to be; (5), That the plaintiff has no interest in the subject, or no right to institute a suit concerning it; (6), That the plaintiff has no right to call on the defendant concerning the subject; (7), That the defendant is not the person he is alleged to be; or does not, in truth, sustain the character he is alleged to bear; (8), That the defend-



ant has not that interest in the subject which can make him liable to the demands of the plaintiff, (9), That for some reason founded in the substance of the case, the plaintiff is not entitled to the relief he prays; (10), The deficiency of the bill to answer the purposes of complete justice; and (11), That suits are unnecessarily multiplied;

W. C.

1<sup>k</sup>. That the Subject of the Suit *is not within the Jurisdiction of a Court of Equity.*

A case which is not really such as will give a court of equity jurisdiction cannot easily be so disguised in a bill as to avoid a demurrer, (*Ante*, p. 1147); but there may be instances to the contrary, and in such cases it seems that a plea setting forth the facts which show the want of equitable jurisdiction over the subject would hold. Thus, in the case of a bill filed to give effect to an instrument which is alleged to be lost, where there is no other ground for the interposition of equity, a plea might, perhaps, be admitted, showing the existence of the instrument, and that it was in the power of the plaintiff. (*Mitf. Eq. Pl.* 178, 180.)

2<sup>k</sup>. That some *other Court of Equity has the proper Jurisdiction.*

The principles here are the same as those which have been already set forth in respect to controverting the jurisdiction of any court where a suit is pending. See *Ante*, p. 1147, 1114,—'15.

The student will remember that the circumstances which regulate the territorial jurisdiction of the courts are, in Virginia, the same in chancery as at law. (V. C. 1873, c. 165, § 1 & seq.)

3<sup>k</sup>. That the Plaintiff is not entitled to Sue, *by Reason of some Personal Disability.*

Lord Redesdale enumerates as many as six causes which disabled one in England at the date of his treatise to sue in equity, namely, that the plaintiff is (1), Outlawed; (2), Excommunicated; (3), A popish recusant; (4), Attainted of treason, felony, or *præmunire*; (5), An alien enemy; and (6), Incapable to sue alone. (*Mitf. Eq. Pl.* 178, 185 & seq.) In Virginia we have but two of such disabilities—that the plaintiff is (1), An alien enemy; and (2), Incapable to sue alone, as a married woman without her husband, an idiot, or lunatic, or infant without his committee, guardian, or next friend. (*Ante*, p. 626—'7; V. C. 1873, c. 201, § 28.)

- 4<sup>k</sup>. That the *Plaintiff is not the Person he pretends to be*, or does not in fact sustain the Character he Assumes.

Thus, if a plaintiff entitle himself *as administrator*, the defendant may plead that he was not administrator, or that the supposed decedent *is living*. (Mitf. Eq. Pl. 178, 188.)

- 5<sup>k</sup>. That the Plaintiff, or some one of the Plaintiffs, *has no interest in the subject, or no right to institute a suit concerning it*.

It cannot often be necessary to make defence on this ground *by way of plea*. For if the bill does not state *facts* from which a title in the plaintiff, and in all the plaintiffs, must be inferred, though the bill does contain an assertion that each several plaintiff *has a title*, the defendant may demur. (Mitf. Eq. Pl. 178, 189, 191; Raffety v. King, 1 Keen, (15 Eng. Ch. R.) 619; Livingston v. Woodworth, 15 How. 557; Dickenson v. Davis, 2 Leigh, 407; Vaiden v. Stubblefield, 28 Grat. 157-8.)

- 6<sup>k</sup>. That the Plaintiff *has no Right to call on the Defendant concerning the Subject*.

It would probably be difficult to frame a bill which was really liable to objection on this head so artfully as to avoid a demurrer. But if such a bill could be framed, the defence might doubtless be made *by plea*. (Mitf. Eq. Pl. 178, 192.)

- 7<sup>k</sup>. That the Defendant *is not the Person he is alleged to be*, or does *not in truth sustain the Character he is alleged to bear*.

This defence is more frequently made *by answer*; but the answer in fact amounts to a plea. (Mitf. Eq. Pl. 179, 192.)

- 8<sup>k</sup>. That the Defendant *has not that Interest in the Subject which can make him liable to the demands of the Plaintiff*.

Thus where a witness to a will is made a defendant to a bill brought by the heir at law to discover the circumstances attending the execution of the will, and the bill contains a charge of *pretence of interest* by the defendant, a plea denying the charge might probably be resorted to. (Mitf. Eq. Pl. 179, 193.)

- 9<sup>k</sup>. That for some Reason *founded on the Substance of the Case, the Plaintiff is not entitled to the Relief he prays*.

Of the several grounds for a plea to the bill thus far stated, the second is generally termed a plea *to the jurisdiction* of the court; and the third, and the

seventh, are treated as pleas *to the person* of the plaintiff and defendant; the others are considered as *pleas in bar* of the suit. (Mitf. Eq. Pl. 179.)

Though the subject of a suit may be within the jurisdiction of a court of equity, and the court wherein the bill is exhibited may have the proper jurisdiction, though the plaintiff may be under no personal disability, and may be the person he pretends to be, and have a claim of interest in the subject and a right to call on the defendant concerning it; and though the defendant may be the person he is stated to be, and may claim an interest in the subject which may make him liable to the plaintiff's demand; yet still the plaintiff, by reason of some additional circumstances, may not be entitled, in the whole or in part, to the relief or assistance which he prays by his bill. The objections to the bill to be considered under this head are also known as *pleas in bar*, and are ranked under the heads of (1), Pleas of matters as of record in the same or some other court of equity; (2), Pleas of matters of record elsewhere than in a court of equity; and (3), Pleas of matters *in pais*. (Mitf. Eq. Pl. 198, 194.)

W. C.

1<sup>1</sup>. Pleas in bar of *Matters as of Record, in the same, or in some other Court of Equity.*

These pleas may be of, (1), A decree or order of the court by which the rights of the parties are already determined, or another bill for the same cause was dismissed upon its merits, (Mitf. Eq. Pl. 194 & seq; Gregory v. Molesworth, 3 Atk. 626; Prettyman v. Prettyman, 1 Vern. 310); or (2), Another suit depending in the same, or some other court of equity, between the same parties for the same cause. (Mitf. Eq. Pl. 194 & seq; Foster v. Vassall, 3 Atk. 589.)

Pleas of this nature generally go both to the discovery sought; and the relief prayed by the bill. (Mitf. Eq. Pl. 194-'5.)

2<sup>1</sup>. Pleas in bar of *Matters as of Record, otherwise than in a Court of Equity.*

This class of pleas embraced formerly in England a fine, a recovery, or a judgment at law or sentence of some other court; and at present, both in England and with us, it comprises only the last named, that is, judgments at law, or the sentence of some other court. (Mitf. Eq. Pl. 201, 204 & seq.)

Thus, to a bill to set aside a judgment as ob-

tained *against conscience*, but not averring fraud, surprise, collusion, accident, or any other special ground of equitable interference, the defendant may in general plead the verdict and judgment in bar; and even the sentence of a foreign court having full jurisdiction may be so pleaded. (Mitf. Eq. Pl. 204-'5; Stor. Eq. Pl. § 783; Stor. Conf. L., § 584 & seq; Williams v. Lee, 3 Atk. 223; Gage v. Bulkeley, 3 Atk. 215; Henderson v. Henderson, 3 Hare, (25 Eng. Ch. R.), 114 & seq. & n (1); Earl of Oxford's Case, (1 Ch. Rep.), 2 Wh. & Tud. (Pt. II), 75, 82 & seq, 96 & seq; Maupin v. Whiting, 1 Call. 224; Terrell v. Dick, 1 Call. 546; Meredith v. Johns, 1 H. & M. 596 & seq; Faulkner v. Harwood, 6 Rand. 125; Norris v. Hume, 2 Leigh, 336; Crawford v. Thurmond, 3 Leigh, 85; Calloway v. Alexander, 8 Leigh, 114; Hendricks v. Campton, 2 Rob. 192; Griffith v. Thompson, 4 Grat. 147; White v. Washington, 5 Grat. 647; Hudson v. Kline, 9 Grat. 379; George v. Strange, 10 Grat. 499; Meem v. Rucker, 10 Grat. 506; Wallace v. Richmond, 26 Grat. 67; Goolsby v. St. John, 25 Grat. 146, 151 & seq; Richmond Eng. Co. v. Robinson, 24 Grat. 548; Penn v. Reynolds, 23 Grat. 518; Holland v. Trotter, 22 Grat. 140-'41.) But where the judgment is obtained by fraud, surprise, or accident, or where there is any other special ground of equitable interposition, the plaintiff in equity having been guilty of no laches in the conduct of his case at law, a plea of the verdict and judgment will not avail. (Mitf. Eq. Pl. 205 & seq; Stor. Eq. Pl. § 784 & seq; *Ante*, p. 759; Calloway v. Alexander, 8 Leigh, 114; Mason v. Nelson, 11 Leigh, 227; Knifong v. Hendricks, 2 Grat. 212; Foushee v. Lea, 4 Call. 285; White v. Washington, 5 Grat. 647-'8; Rust v. Ware, 6 Grat. 50; Pestross v. McLaughlin, 6 Grat. 64; McClellan v. Kinnaird, 6 Grat. 352; Byrne v. Edwards, 23 Grat. 200.) The case of a gaming promise or consideration, however, is a notable exception to the general rule, that if one omits to defend himself at law, where it is in his power, he cannot be relieved in equity. The statute designed to suppress gaming invalidates "every contract, conveyance, or assurance of which the consideration" is money, &c., won or bet on any game, &c., or lent to be bet, (V. C. 1873, c. 139, § 2), and therefore invalidates *judgments* as well as other as-

surances; and this statute, courts of equity having regard to the ruinous consequences of the vice of gambling, are especially solicitous to enforce. Hence, a party sued upon a gaming security may waive all defence at law, and still seek relief in equity. (1 Stor. Eq. Pl. §302; Woodroffe v. Farnham, 2 Vern. 291; Rawden v. Shadwell, 1 Ambl. 269, & notes; Fleetwood v. Jansen, 2 Atk. 467; Wynne v. Callander, 1 Russ. (1\* Eng. Ch. R.), 296; *Ld. Portarlington v. Soulby*, 3 My. & K. (8 Eng. Ch. R.), 104; Woodson v. Barret, 2 H. & M. 80; Skipwith v. Strother, 3 Rand. 214; White v. Washington, 5 Grat. 649.) But if the defendant elects to make his defence at law, and upon a *full and fair trial* in that forum, so that he can allege neither fraud, misfortune, nor accident, there is a verdict and judgment against him, he cannot renew the controversy in a court of equity. (*White v. Washington*, 5 Grat. 649-'50.)

### 3<sup>l</sup>. Pleas in Bar, of Matters in *Pais*.

Pleas of this sort sometimes go both to the discovery sought, and to the relief prayed by the bill, or partially to both or either. Such pleas are principally as follows: (1), A stated account; (2), An award; (3), A release; (4), A will or conveyance; and (5), A plea of any statute which may bar the plaintiff's demand, such as the statute of limitations, &c. (Mitf. Eq. Pl. 207);  
W. C.

#### 1<sup>m</sup>. Plea of a *Stated Account*.

A plea of a *stated account* applies of course only to a bill filed for an account which the plaintiff alleges to be mutual and *unsettled*; for supposing it to have been already settled, (for that is what is meant by its being *stated*,) the jurisdiction of the court fails. If error or fraud in the stating of the account are alleged in the bill, they must be denied by the plea as well as by way of answer; and although neither error nor fraud be charged the plea should aver that the stated account is just and true to the best of the defendant's knowledge and belief. (Mitf. Eq. Pl. 208.)

#### 2<sup>m</sup>. Plea of an *Award*.

Where a bill is filed to set aside an award, and to open again the transactions between the parties, the award may be pleaded to the bill, in bar of both the discovery and relief sought. But if fraud or partiality are charged on the arbitrators, those

charges must not only be denied by averment in the plea, but the plea must be supported by an answer showing the arbitrators to have been incorrupt and impartial. (Mitf. Eq. Pl. 209.)

3<sup>m</sup>. Plea of a *Release*.

If the plaintiff, or the person under whom he claims, has released the subject of his demand, the defendant may plead it in bar of the bill; and such a plea must show that the release was under seal, or was founded upon an actual valuable consideration; and if the demand were evidenced by a deed, the release must also be by deed. (Bac. Abr. Release, (A) 1; Id. (L); 2 Th. Co. Lit. 122, n (O. 3); Roosevelt's Lessee v. Stackhouse, 1 Cow. (N. Y.) 122; Crawford v. Millspaugh, 13 Johns. (N. Y.) 87; Sigourney v. Sibley, 21 Pick. (Mass.) 101; Steptoe v. Harvey, 7 Leigh, 501; Preston v. Hull, 23 Grat. 600, 616.)

4<sup>m</sup>. Plea of a *Will or Conveyance*.

To a bill brought upon equitable grounds by an heir at law against a devisee out of possession, the devisee may plead the will, and that it was duly executed. And so upon a bill filed by an heir against a person claiming under a conveyance from the ancestor, the defendant may plead the conveyance in bar of the suit. (Mitf. Eq. Pl. 210.)

5<sup>m</sup>. Plea of any Statute which may be a *Bar to the Plaintiff's Demand*, such as the *Statute of Limitations*, &c.

Thus, to a bill for the specific enforcement of an agreement to convey lands, the defendant may plead the statute of *parol agreements*, (V. C. 1873, c. 140, § 1, (cl. 6),) requiring any contract for the sale of real estate, or (for) the lease thereof for more than a year to be in writing, and signed by the party to be charged thereby, or his agent, with an averment that there was no such agreement in writing signed by him. And if any matter is charged by the bill which may avoid the bar created by the statute, that matter must be denied in the plea; and also, particularly and precisely, by way of answer to support the plea. (Mitf. Eq. Pl. 211-12.)

The *statute of limitations* is also a good plea. But if the bill charges fraud, and that it was not discovered until within five years before filing the bill, the plea must deny the fraud, or aver that the fraud, if any, was discovered within the five

years. (Mitf. Eq. Pl. 212; Bree v. Holbech, 2 Dougl. 656; Blair v. Bromley, 5 Hare, (26 Eng. Ch. R.) 558; Shields v. Anderson, 3 Leigh, 729, 732 & seq; Foster v. Rison, 17 Grat. 345.) Although it seems to be doubtful whether in a *court of law* an undiscovered fraud is an answer to the statute, (because it is not one of the exceptions and savings therein mentioned.) (Bree v. Holbech, 2 Dougl. 656; Blair v. Bromley, 5 Hare, (26 Eng. Ch. R.) 559; Clark v. Hougham, 2 B. & Cr. (9 E. C. R.) 149; Imperial Gas Co. v. London Gas Co., 10 Excheq. 44-'5, and note; Rice v. White, 4 Leigh, 474; Troup v. Johns, (N. Y.) 43; Allen v. Mille, 17 Wend. (N. Y.) 202.)

It should be observed, before passing away from the subject, that the statute of limitations must appear from the pleadings to have been relied on; but it is not indispensable that it should be *pleaded*. It may be as well insisted upon *by answer*. (Stor. (Eq. § 503, 751; Colvert v. Millstead, 5 Leigh, 98; Tazewell v. Whittle, 13 Grat. 329.)

10<sup>k</sup>. The Deficiency of the Bill to answer the Purposes of Complete Justice.

Supposing the plaintiff to have a complete title to the relief he prays, and that the defendant can set up no defence in bar of that title, yet if the defendant has an equal claim to the protection of a court of equity as the plaintiff, the court will not interpose on either side, and the matter may be taken advantage of either by plea or answer. (Mitf. Eq. Pl. 215.)

This happens when the defendant claims as a *purchaser* of the legal title for value, and without notice of the plaintiff's equity, which the bill seeks to assert. The plea must aver that the defendant is a *complete purchaser* by actual conveyance, and not by mere agreement to convey, and that he has *fully* paid the purchase-money, and not merely bound himself to pay it, or paid it in part. It must also deny notice of the plaintiff's title before he became thus a complete purchaser. (Mitf. Eq. Pl. 215 & seq; 2 Insts. Com. & Stat. Law, 203, 877 & seq; Beverley v. Brooks, 2 Leigh, 446; Doswell v. Buchanan, 3 Leigh, 381; Mutual Assurance Society v. Stone, 3 Leigh, 235; Carter v. Allan, 21 Grat. 241; Tourville v. Naish, 3 P. Wms. 307.)

A purchaser with notice from a purchaser without notice, may shelter himself under the privilege of

the first purchaser; but notice to an agent or attorney is notice to the principal: (Mitf. Eq. Pl. 218 & seq; 2 Insts. Com. & Stat. Law, 888 & seq; Lacy v. Wilson, 4 Munf. 313; Spengler v. Snapp, 5 Leigh, 478.)

11<sup>k</sup>. The unnecessary *Multiplication of Suits*.

The ground of this plea is usually the want of proper parties, which, when it is apparent on the face of the bill, may be objected to by demurrer; and when not so apparent, by plea or answer. Such a plea goes both to discovery and relief, where relief is prayed, though the want of parties is no objection to a bill for discovery merely. If upon discussion of a plea of this kind, the court shall deem it well founded, it may, and generally will, give the plaintiff leave to amend his bill, and make the proper parties. (Mitf. Eq. Pl. 220 & seq.)

2<sup>l</sup>. The Objections which can be taken Advantage of by Plea, in the case of *Original Bills not asking Relief*.

These objections are nearly the same as those which have been already mentioned, (*Ante*, p. 1153,) as causes of demurrer to discovery. They may be, (1), That the plaintiff's case is not one where a court of equity has jurisdiction to compel a discovery in his favor; (2), That the plaintiff has no interest in the subject, or no interest which entitles him to call on the defendant for a discovery; (3), That the defendant has no interest in the subject to entitle the plaintiff to institute a suit against him, even for the purpose of discovery only; and (4), That the situation of the defendant renders it improper for a court of equity to compel a discovery. (Mitf. Eq. Pl. 222;

W. C.

1<sup>k</sup>. That the Plaintiff's Case is not one where a Court of Equity has jurisdiction to compel a Discovery in his favor.

Supposing the bill to make a cause such as would warrant the court to compel the discovery prayed for, so that it is not liable to demurrer, the defendant may by plea state the matter as it truly exists, and thus show that the jurisdiction cannot be sustained. (Mitf. Eq. Pl. 222.)

2<sup>k</sup>. That the Plaintiff has no Interest in the Subject, or no Interest which entitles him to call on the Defendant for a Discovery.

Thus, if the plaintiff states himself to be heir, or personal representative of a deceased person, and in



that character seeks a discovery from one in possession of property which belonged to the decedent, of his title thereto, and of the particulars of which it consists, the defendant may by plea deny that the plaintiff is heir or personal representative, or may allege that the supposed decedent is still living. Thus he protects himself from making a discovery which may involve him in difficulty and expense, and perhaps be prejudicial to him in other cases. (Mitf. Eq. Pl. 222-'3.)

- 3<sup>k</sup>. That the *Defendant has no Interest in the Subject* to entitle the Plaintiff to institute a Suit against him, *even for Discovery only.*

The defendant in this case can rarely protect himself by a demurrer, because it will seldom happen that his want of interest will appear on the face of the bill, although it may sometimes be apparent on the face of the documents filed with it. In general, however, resort must be had either to a plea or to a disclaimer. (Mitf. Eq. Pl. 223; Stor. Eq. Pl. § 819; *Plummer v. May*, 1 Ves. Sen. 426; *Fenton v. Hughes*, 7 Ves. 288 & seq.)

- 4<sup>k</sup>. That the *Situation of the Defendant renders it improper* for a Court of Equity to *compel a Discovery.*

The several cases where pleas of this kind are applicable may be thus enumerated, (1); Because the discovery may subject the defendant to pains and penalties; (2), Because it will subject him to a forfeiture; (3), Because it would involve the betrayal of professional confidence, as an attorney at law, &c.; and (4), Because the defendant is a purchaser for valuable consideration without notice of the plaintiff's title. (Mitf. Eq. Pl. 223-'4;)

W. C.

- 1<sup>l</sup>. Plea that the Discovery prayed may subject the Defendant to *Pains and Penalties.*

If the bill requires an answer which may subject the defendant to any pains or penalties, or tend to accuse him of any crime, and this is not so apparent upon the face of the bill that the defendant can demur, he may *by plea* set forth by what means he may be liable to punishment, and insist that he is not bound to answer the bill, or so much thereof as the plea will cover. (Mitf. Eq. Pl. 224.)

Thus to a bill brought for a discovery of a marriage, when the fact, if true, would subject the defendant to punishment for incest or for bigamy, the defendant may by a plea show that it is

so, and thus avoid making the discovery. (Mitf. Eq. Pl. 224 & seq.; *Brownsword v. Edwards*, 2 Ves. Sen. 245; *Chetwynd v. Lindon*, Id. 451; *N. W. Bank v. Nelson*, 1 Grat. 126 & seq.)

An interesting illustration of the use of a plea of this nature in order to avoid answering the bill is afforded by the case of *United States of America v. McRae*, 4 Eq. Cas. (Law Rep.) 335 & seq. (1867.) The United States filed a bill in the court of chancery of England, averring that certain persons had, in 1861, set on foot a rebellion against its authority, and had organized a pretended government, under the name of the "Government of the Confederate States of America;" that such Confederate States Government had possessed itself of divers moneys, goods, and treasures belonging to the plaintiff, and to subjects of the plaintiff, which had become part of such pretended government's public property; that said pretended government had sent large sums of money, and divers quantities of goods to agents in England, in order to purchase munitions of war, and other commodities for the use of the said government; that amongst these agents was one Colin J. McRae, who was made defendant to the bill, and who was alleged to have had in his hands at the period of the dissolution of the said pretended government, large sums of money, and large quantities of goods which had been sent to him as agent of the said government, or had arisen from the proceeds of the sales of goods so sent; that the rebellion was entirely suppressed, and the said pretended government had ceased to exist; and that all moneys and property belonging thereto had vested absolutely, by right of conquest, in the plaintiff. The prayer of the bill was, that the defendant McRae should account for the moneys and goods which had come to his hands as agent of the Confederate States government, and pay and deliver the same to the plaintiff; that a receiver should be appointed to take care of the same; and for an injunction to prohibit the defendant from parting with the moneys and goods in his hands.

To this bill the defendant, McRae, *filed a plea* setting forth an act of the Congress of the United States denouncing the forfeiture of all property of persons concerned in the rebellion, or holding any office or agency under the government of the so

called Confederate States of America; that defendant was the proprietor of certain lands and estate in Selma, in the county of Dallas, in the State of Alabama, in the United States of America, and that by virtue of the said act of Congress, proceedings *in rem* had been instituted, and were then in the course of prosecution against him in the district court of the United States, at Montgomery, in Alabama, for participation in the rebellion, in order to subject his property in the United States to forfeiture; that the alleged acts of defendant set forth in the bill, as agent of the so called Confederate States government, were also alleged as the grounds of the proceeding in the said district court of the United States; that no pardon nor amnesty had been extended to defendant under the said act of Congress; that he could not answer the bill without exposing himself to forfeit his property in the United States; and that it was inequitable that the plaintiff should obtain the relief sought, without waiving and releasing all forfeitures and penalties under the act—all which matters defendant pleads in bar of the discovery and relief sought by the bill.

The plea being set down for argument, Vice-Chancellor Sir W. Page Wood held it to be a bar to both discovery and relief; to *discovery*, because as to most of the averments and interrogatories, it would or might subject the defendant to the confiscation of his property in the United States; and to *relief*, because in a bill of such a character, the forfeiture must always be waived before the bill can be filed, inasmuch as *he who asks equity must do equity*. (Mitf. Eq. Pl. 226; 1 Dan. Ch. Pr. 354 & seq; Harrison v. Southcote, 1 Atk. 528; S. C. 2 Ves. Sen. 389; but see King of the two Sicilies v. Wilcox, 1 Sim. N. S. (40 Eng. Ch. R.), 330 & seq.)

2<sup>1</sup>. Plea that the Discovery prayed for may *subject the Defendant to a Forfeiture*.

No person is bound to answer so as to subject himself to any forfeiture, or to anything in the nature of a forfeiture. If this is apparent on the bill, the defence may be made by demurrer, otherwise it may be made by way of plea. (Mitf. Eq. Pl. 226; Stor. Eq. Pl. § 824, 521 & seq.)

3<sup>1</sup>. Plea that the Discovery prayed for would *involve the Betrayal of Professional Confidence*, as in case of an Attorney at Law, &c.

As *legal advisers* are not permitted to disclose, as *witnesses*, what they have learned from their clients under the seal of professional confidence. (*Ante*, p. 707-'8), so neither, by parity of reason, can such matters be extorted from them by a bill for a discovery; but the defendant may plead that his knowledge was so obtained. (Mitf. Eq. Pl. 227-'8; Stor. Eq. Pl. § 824, 825, n (3), 599 & seq.)

And so, upon a principle of public policy somewhat different, but equally well founded, an *arbitrator* may, either by demurrer or plea, according as the objection is or is not apparent on the bill, make defence against a bill seeking a discovery of the grounds and foundation of his award. (Mitf. Eq. Pl. 217-'8; Stor. Eq. Pl. § 824, 825, n 3; Anon. 3 Atk. 644.)

- 4<sup>1</sup>. Plea that the Discovery prayed will operate against the Rights of the Defendant, who is a *Purchaser for Value, and without Notice*.

See Mitf. Eq. Pl. 228; Stor. Eq. Pl. § 824, 603, & seq; *Ante*, p. 1162.

- 2<sup>a</sup>. Objections which can be taken Advantage of by Plea, in the case of *Bills not Original*.

Bills not original, it will be remembered, embrace (1), Supplemental bills; (2), Bills of Revivor; and (3), Bills of Revivor and Supplement. And it must suffice here to say, in respect to each of them, that if the plaintiff is not entitled to file such bill, and the objection does not appear upon the face of it, so as to enable the defendant to demur, he must state his objection *by way of plea*. (Coop. Eq. Pl. 392 & seq; Stor. Eq. Pl. § 826 & seq; *Ante*, p. 1153.)

- 3<sup>a</sup>. The Objections which can be taken Advantage of by Plea, in the case of *Bills in the Nature of Original Bills*.

The most important instances of bills in the nature of original bills are, as we have seen, (*Ante*, p. 1134,) the following: (1), Cross bills; (2), Bills of review, and bills in the nature of bills of review; (3), Bills to impeach a decree on the ground of fraud or surprise; and (4), Bills in the nature of bills of revivor and supplement;

W. O.

- 1<sup>1</sup>. Pleas in the case of *Cross Bills*.

As a cross bill differs in nothing from the first species of bills, with respect to which pleas in general have been considered, except that it is always occasioned by a former bill, it is not liable to any plea

which will not hold to the first species of bill. And a cross bill is not liable to some pleas which will hold to the first species of bills; as pleas to the jurisdiction of the court, and pleas to the person of the plaintiff, the sufficiency of which seem both affirmed by the original bill; unless the cross bill is exhibited by some person alone, who alone is incapable of instituting a suit, as an infant, a *feme covert*, an idiot, or a lunatic. (Mitf. Eq. Pl. 230; Stor. Eq. Pl. § 628.)

2<sup>d</sup>. Pleas in the case of *Bills of Review, and of Bills in the Nature of Bills of Review.*

It is said to be a usual defence to a bill of review for error apparent on a decree, to *plead the decree*, (Mitf. Eq. Pl. 231; Gould v. Tancred, 2 Atk. 534; Gregory v. Molesworth, 3 Atk. 627; Dancer v. Evett, 1 Vern. 392); although it would seem to be in general more properly ground for a demurrer, inasmuch as, for the most part, the objection, if it be a real one, appears on the face of the bill, &c. But where any matter beyond the decree, such as length of time, (in Virginia, *three years*, V. C. 1873, c. 175, § 5,) a purchase for a valuable consideration, or any other extrinsic matter, is to be offered, it must be pleaded. (Mitf. Eq. Pl. 231.)

3<sup>d</sup>. Pleas in the case of *Bills to impeach a Decree on the ground of Fraud or Surprise.*

In this case, a plea of the decree, accompanied by a denial of the fraud or surprise charged, seems to be a proper mode of defence, (Mitf. Eq. Pl. 232.)

4<sup>d</sup>. Pleas in the Case of *Bills in the Nature of Bills of Revivor and Supplement.*

Bills in the nature of bills of revivor, or of supplemental bills, are liable to the same pleas as the bills of whose nature they partake. (Mitf. Eq. Pl. 232.)

2<sup>g</sup>. The Nature of Pleas in *General.*

In pleading there must be in general the same strictness in equity as at law, at least in *matter of substance*. A plea *in bar* must follow the bill, and not evade it, or mistake the subject of it; and if it does not go to the whole bill, must define to what part it is designed to apply, and be a *complete answer* to that. Hence, a plea to such parts of the bill as yet are not answered by it, is too general, and must be overruled. And so also, a plea is insufficient which extends to the whole bill, *except* such matters as are mentioned, not in the plea itself, (although that would be an irregular mode of expressing the exception,) but *in an answer* filed with it. (Mitf. Eq. Pl. 233-3; Stor. Eq. Pl. § 658; 2 Rob. Pr. (1st

ed.) 303; Anon. (two cases), 3 Atk. 70; Salkeld v. Science, 2 Ves. Sen. 108; Drew v. Drew, 2 Ves. & B. 161-2; Allen v. Randolph, 4 Johns. Ch. R. (N. Y.) 693; Bolton v. Gardner, 3 Pai. (N. Y.) 278; Heart v. Corning, 3 Id. 566.)

The mere conclusion of the plea is less material, for although, if it relates to *but a part* of the allegations of the bill, it is irregular to conclude to the whole relief sought; yet if it does, the plea is not, therefore, to be disallowed, but will be ordered to stand for as much of the bill as it covers, and the defendant may be required to answer for the residue. (2 Rob. Pr. (1st ed.) 303; French v. Shotwell, 5 Johns. Ch. R. (N. Y.) 562; S. C. on appeal, 20 Johns. 668.)

A plea ought not to contain *more defences than one*. It may indeed, be allowed in part, and overruled in part, and it may contain a variety of circumstances, if they all tend to one point; but if it were permitted to contain several *distinct defences* to the same part or parts of the bill, it would defeat the very purpose and end of a plea, which is to reduce the cause, or the part of it to which the plea relates, to a single point, in order to save expense to the parties, and to avoid a discovery which the defendant ought not to be compelled to make. (Mitf. Eq. Pl. 233, &c.; Stor. Eq. Pl. § 652, 653 & seq; 2 Rob. Pr. (1st ed.) 303; Milligan v. Milledge, 3 Cr. 220; Goodrich v. Pendleton, 3 Johns. Ch. R. (N. Y.) 384.) Nor does the fact that several distinct matters may be pleaded at once at law, show that a like mode of pleading is proper in equity, *first*, because the statute which allows several pleas is applicable in terms only to courts of law, "the defendant *in any action* may plead as many several matters of law or fact as he shall think necessary," (V. C. 1873, c. 167, § 24,) and *second*, because the same occasion for the indulgence does not exist in a court of equity, where the defence is not confined to the plea, as it is at law, but may be made by answer also. (Mitf. Eq. Pl. 234-5; Stor. Eq. Pl. 657; Whitbread v. Brockhurst, 1 Bro. C. C. 404, 416, &c., & n (9). But yet, as it may happen that, in rare instances, great inconvenience would result if several pleas were not allowed, a discretion resides in the court to admit them in such cases. (Stor. Eq. Pl. § 657; Gibson v. Whitehead, 4 Madd. R. (Am. ed) 129; Kay v. Marshall, 1 Keen, (15 Eng. Ch. R. 196.) In Virginia, indeed, a disposition has been exhibited to regard the statute above cited, allowing as many several matters of law or fact to be pleaded as the defendant may think necessary, as extending by

analogy to the courts of equity, and as permitting, therefore, at one and the same time, in any case, an answer, demurrer and plea to the same matter in the bill, without the exercise of any discretion on the part of the court. (*Bassett v. Cunningham*, 7 Leigh, 407, 409, 410.) And such seems to have been the more recent view of the legislature. (V. C. 1873, c. 179, § 1; *Jones v. Clark*, 25 Grat. 675.)

The plea must aver facts extrinsic to the bill, for if they appear on its face the defendant should demur. It ought, moreover, to be direct and positive in its averments, and not expressive merely of the defendant's *belief*, or by way of *argument or inference*; nor is there any hardship in this, even where the plea is required to be sworn to, for the affidavit may, and generally does import that so much of the plea as relates to the defendant's own acts is true, and so much as relates to acts of others he believes to be true, and may always be so guarded as to save the tenderest conscience. (Mitf. Eq. Pl. 235-'6, Stor. Eq. Pl. § 662 & seq.)

It was formerly a vexed question, whether a purely negative plea to a bill was a legitimate mode of defence in courts of equity, as it unquestionably is at law. As for example, whether to a bill claiming as heir at law, the defendant could plead that he was not *heir at law*. But that doubt has been dissipated; and it is now firmly established that such a plea is good. If it were not good it would follow that any person falsely alleging a title in himself might compel any other person to make any discovery which that title, if true, would enable him to require, however injurious to the defendant. And thus the title to every estate, the transactions of every commercial house, and even the private incidents of domestic life might be exposed; and that in the name of a pauper, at the instigation of others, and for the worst purposes. (Stor. Eq. Pl. 668, 669; *Hall v. Noyes*, 3 Bro. C. C. 489; *Jones v. Davis*, 16 Ves. 264-'5.)

A plea must sometimes be *supported*, as it is called, by an answer. This may happen whenever the plaintiff, in his bill, anticipates the defence, and seeks to repel it by the averment of circumstances adapted to that end; such as *fraud*, in order to do away with a *release* on which it is expected the defendant will rely, *notice* to rebut an allegation of a *purchase for value*, a *new promise* to repel the *statute of limitations*, &c.; and demands from the defendant a *discovery* touching the alleged fraud, notice, or new promise, &c. In such cases the plaintiff is entitled to the discovery he seeks, as well as to a response

to the averments of his bill, and it is manifest that a plea by itself, whilst it might afford the response to the averments, would not satisfy the other requirement of a discovery. Hence, whilst the defendant in the cases supposed might be admitted to file a plea alleging the release (which plea must expressly negative the fraud imputed by the plaintiff), or alleging the purchase for value (denying the notice), or propounding as a defence the statute of limitations, yet it would be requisite that he should in each case *support his plea* by an answer disclosing the truth according to the interrogatories addressed to him in the plaintiff's bill. (Mitf. Eq. Pl. 236, 197, 205, 208, 209, 212, 216; Stor. Eq. Pl. § 672; 2 Rob. Pr. (1st ed.) 303; Bayley v. Adams, 6 Ves. 594 & seq. 599, note; Foley v. Hill, 3 My. & Cr. (14 Eng. Ch. R.) 480 &c.; Goodrich v. Pendleton, 3 Johns. Ch. R. (N. Y.) 384; Kane v. Bloodgood, 7 Johns. Ch. R. 134; S. C. on Appeal, 8 Cow. 360.)

### 3<sup>d</sup>. The Form and Structure of Pleas.

A plea, like a demurrer, is introduced by a *protestation* against the confession of the truth of any matter contained in the bill. For the purpose of determining the validity of the plea, the bill is taken for true so far as it is not contradicted thereby; and the protestation is supposed to have been resorted to in order to prevent a similar conclusion for other purposes and in other causes. (Mitf. Eq. Pl. 238; Stor. Eq. Pl. § 694; *Ante*, p. 616, 913-'14.)

The extent to which the plea is designed to go, whether to all, or only to a part of the bill, and to which part, is next to be stated, and should be clearly and distinctly shown. This is followed by the matter relied upon as an objection to the jurisdiction of the court, to the person of the plaintiff or defendant, or in bar of the suit, accompanied by such averments as are necessary to support it. And the plea commonly concludes with a repetition that the matters so offered are relied upon as an objection or bar to the suit, or to so much of it as the plea extends to; and prays the judgment of the court whether the defendant ought to be compelled further to answer the bill, or such part as is thus pleaded to. (Mitf. Eq. Pl. 238-'9.)

If the plea is accompanied by an answer merely to support it, the answer is stated to be made for that purpose, not waiving the plea. If the plea is to part of a bill only, and there is an answer to the rest, it is expressed to be an answer to so much of the bill as is not



before pleaded to, and is preceded by the same disclaimer of waiving the plea. (Mitf. Eq. Pl. 239.)

Pleas should be signed by counsel, in order to guard against irrelevancy, scandal or other impropriety, and in England they are sworn to if they contain matter *in pais* only; but if they consist of matter of record, they need not be on oath. It seems that in the United States courts a plea must not only be sworn to, but counsel must certify that in his opinion it is true in point of fact. In Virginia, it is believed not to be usual to swear to any other pleas than those of a dilatory character. (Mitf. Eq. Pl. 239; 1 Abb. U. S. Pr. 138; Sands' Suit in Eq. 384, 401.)

The structure of a plea may be illustrated by the following general *formulae* of commencement and conclusion (which are alike adapted to any manner of pleas, whether dilatory or peremptory), as applied to the parties in the case propounded, *Ante*, p. 1110-'11.)

#### GENERAL FORMULA OF A PLEA IN CHANCERY.

##### *Caption.*

The separate plea of Jane Hart, in her own right, and as administratrix with the will annexed of Thomas Hart, deceased, to a bill of complaint exhibited against her and others in the circuit court for the county of A, by James Hart.

##### *Commencement.*

The said defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said bill of complaint contained to be true in manner and form as the same are therein set forth, for plea nevertheless to the said bill, doth plead and aver that—

##### *Substantial part.*

[*Here set forth the substance of the Plea.*]

##### *Conclusion.*

Wherefore the said defendant prays judgment of this court, whether she shall be compelled to make any other or further answer to the said bill, and prays to be hence dismissed with her reasonable costs and charges in this behalf most wrongfully sustained.

D. G. W., p. d.

The *substantial parts* of pleas to be used in connection with this *formula*, may be set forth as follows, but having, it will be observed, no affinity with the case stated *ante*, p. 1110-'11:

#### PLEAS IN ABATEMENT.

##### 1. *Coverture of Plaintiff.*

##### *Commencement.*

[Commence as in the general *formula*, and then say:]

##### *Substantial part.*

That the said complainant at the time of filing her said bill was, and now is, under coverture of one H, her husband, who is still living, and in every respect capable, if necessary, of instituting a suit in equity in her behalf.

##### *Conclusion.*

[Conclude as in the general *formula*.]

##### 2. *Coverture of Defendant.*

##### *Commencement, &c.*

[Taking the commencement and conclusion from the *formula*.]

That this defendant, at the time of filing the aforesaid bill, was

*Substantial part.* and now is, under coverture of one H, her husband, who is still living and capable of defending this suit in her behalf.

PLEAS IN BAR.

1. *Plea of Statute of Limitations.*

*Commencem't.* [Commence as in the general formula, and then say]:

*Substantial part.* That if the complainant ever had any cause of action or suit against this defendant, for or concerning any of the matters in the said bill mentioned, which this defendant doth in no wise admit, such cause of action or suit did not accrue within \_\_\_\_\_ years before the filing of the said bill, or before suing out or serving process against this defendant, to appear to and answer the said bill; nor did this defendant at any time within \_\_\_\_\_ years next before the institution of this suit aforesaid, promise or agree to come to any account for, or to make satisfaction, or to pay any sum or sums of money, for or by reason of the said matters charged in said bill.

*Conclusion.* [Conclude as in the general formula.]

2. *Plea of the Statute of Parol Agreements.*

*Commencem't &c.* [Commence and conclude as in the general formula.]

*Substantial part.* That neither this defendant, nor any one by him authorized, did ever sign any contract or agreement in writing, for making and executing any sale or conveyance to the complainant, of the land and premises in the bill mentioned and described, or of any interest therein, or to any such effect, or any memorandum or note in writing of any such agreement.

See Mitf. Eq. Pl. 197; 2 Praxis Alm. Cur. Canc. 450; Sands' Suit in Eq. 384 & seq; Van Heyth. Eq. Draftsman, 640 & seq.

4<sup>th</sup>. The manner in which *Pleas are offered to the Court.*

A bill, demurrer, plea, answer, or disclaimer is with us, in Virginia, to be filed sometimes in the clerk's office, at rules, and sometimes in court, according as the cause, not being yet matured, is still pending at rules, or being matured, is on the court docket. (*Ante*, p. 1118 & seq.) And it will be remembered, that in order to accelerate the maturing of causes, it is provided that the rules shall be held monthly, in the clerk's office of every court, and rules to declare, or to file the bill, to plead, reply, rejoin, or for other proceedings, shall be given *from month to month*. (V. C. 1873, c. 167, § 1, 2, 4, 5.)

5<sup>th</sup>. The manner in which the *Validity of Pleas is Tested.*

If the plaintiff conceives a plea to be defective in point of form or substance, he may take the judgment of the court upon its sufficiency. If upon argument it be overruled as insufficient, no other plea shall afterwards be received, according to our practice; but there shall be a rule upon the defendant to *answer* the bill. (Mitf. Eq. Pl. 239; 2 Rob. Pr. (1st ed.) 304-5; V. C. 1873,

c. 167, § 33.) But if the plea be not overruled, it may be either *allowed simply*, or the benefit of it may be *saved to the hearing*, or it may be ordered to *stand for an answer*. (Mitf. Eq. Pl. 239-'40.)

Supposing the plea to be upon argument *simply allowed*, or its sufficiency not to be contested by the plaintiff, nothing remains but to *take issue upon its truth*. And this issue in fact is by statute in Virginia allowed to be tried *by jury*; and if it be found false, the plaintiff shall have the same advantages as if it had been so found by a verdict at law: (Mitf. Eq. Pl. 240-'41; V. C. 1873, c. 167, § 34.)

And in this connection it may be mentioned that, in equity, as at law, when a bill or other pleading alleges that any person *endorsed, assigned, or accepted any writing*, or where plaintiffs or defendants sue or are sued *as partners*, and their names are set forth in the bill, or sue or are sued as a *corporation*, no proof of the hand-writing, or of the partnership or incorporation shall be required, unless with the pleading which puts it in issue, there be filed an affidavit denying the hand-writing, partnership, or incorporation. (V. C. 1873, c. 167, § 39, 40.)

Where upon argument the benefit of a plea is *saved to the hearing*, it is considered that, so far as appears to the court, it constitutes a full defence; but that there may be matter disclosed in evidence which would avoid it supposing the matter pleaded to be strictly true, and the court will not preclude the question. (Mitf. Eq. Pl. 241.)

When a plea is ordered to *stand for an answer*, it is merely determined that it contains matter which may be a defence, or part of a defence; but that it is not a full defence, or that it has been informally offered by way of plea, or that it has not been properly supported by answer, so that the truth of it is doubtful. (Mitf. Eq. Pl. 241 & seq.)

If the plea is to the *whole bill*, and the facts stated in it are proved, the bill is to be dismissed of course. (2 Rob. Pr. (1st ed.) 305; Hughes v. Blake, 6 Wheat. 472; S. C. 1 Mas. U. S. Cir. Ct. 515; Holmes v. Remsen, 7 Johns. Ch. R. (N. Y.) 190; Dows v. McMichael, 2 Pai. (N. Y.) 345.) And sometimes the plea is shown to be true by the bill itself, and the documents filed with it, although in general, in such a case a demurrer would seem to be the more proper defence. Thus, in Lane v. Ellzey, 6 Rand. 661, to a bill to foreclose a mortgage, the defendant pleaded usury, and upon looking to the mortgage, filed as an exhibit with the bill, it

appeared that it stipulated for the payment of the principal and interest of the debt, and *also rent for the premises*, and so was held to sustain the plea of usury.

3<sup>d</sup>. Defence by *Disclaimer*.

A defendant may by way of defence to a bill disclaim all right or title to the matter in demand. It is preceded and followed by the same formal words, is put in in the same way, and must be sworn to in like manner as an answer. It can, however, scarcely be put in alone, without an answer; never indeed, unless the fact be that the defendant *at no time ever had* an interest in the subject of the suit. If he *once had* an interest therein, with which he has parted, he must answer in order to disclose to whom that interest has been transferred, in order that the person in whom it is vested may be made a party instead of the defendant who disclaims. Accordingly the forms in the books are generally of an *answer and disclaimer*, (Mitf. Eq. Pl. 253; Stor. Eq. Pl. § 838 & seq. 844; Sands' Suit in Eq. 397-'8, 70, 71), although in VanHeythuyzen's Equity Draftsman, p. 620, a form is given of a *mere disclaimer* as follows:

FORM OF DISCLAIMER IN CHANCERY.

<i>Caption.</i>	The disclaimer of H. W. and M. his wife, late M. H., to a bill of complaint exhibited against them and others, in the circuit court for the county of A, by J. H.
<i>Reservation of exceptions.</i>	The said defendants, reserving to themselves all right of exception to the said bill of complaint, say that they, the said defendants, do not know that they to their knowledge and belief ever had, nor did they, or either of them, ever claim or pretend to have, nor do they, or either of them, now claim any right, title, or interest of, in or to the estate of the said T. H. deceased, either real or personal, in the said complainant's bill set forth, or any part thereof;
<i>Disclaimer.</i>	and these defendants do disclaim all right, title and interest to the said estate of the said decedent, and every part thereof. And these defendants deny all fraud, and all unlawful combination and conspiracy, and pray to be hence dismissed with their reasonable costs in this behalf expended; [and they will ever pray, &c.
<i>Denial of fraud, &amp;c.</i>	
<i>Conclusion.</i>	

L. D. A., p. d.

The student will not fail to observe that a disclaimer by any of the parties to the case supposed, (*Ante*, p. 1110-'11.) would be scarcely appropriate; so that this form being put only for illustration, borrows their initials merely for conformity.

4<sup>d</sup>. Defence by *Answer*.

The answer is incomparably the most frequent mode of making defence to a bill in chancery; and in Virginia by reason of the looseness of practice unhappily prevailing, has in effect almost wholly superseded the employ-

ment of the other modes of defence, by demurrer, plea and disclaimer.

It either controverts the case stated by the plaintiff's bill, confessing and avoiding, or else traversing its averments; or, admitting the case made by the bill, it submits to the judgment of the court upon it, or upon a *new case* made by the answer, or both; or lastly it disclaims all title, right, or claim on the part of the respondent, in respect to the subject-matter of the suit.

In the further exposition of the topic, let us note (1), The general nature of answers; (2), The time when an answer should be filed, and the mode of compelling an answer; (3), The form and structure of an answer; and (4), The manner of objecting to the sufficiency of an answer, and of supplying its defects;

W. C.

#### 1<sup>a</sup>. The General Nature of an Answer.

Every plaintiff in equity, by the rules of the forum, is entitled to a discovery from the defendant of the matters charged in the bill, provided they are necessary to the merits of the case, and to enable him to obtain a decree. And the plaintiff may claim and have this discovery, either because he cannot otherwise prove the facts, or in aid of proof and to avoid expense. (Mitf. Eq. Pl. 244-'5.)

If, however, the discovery sought by the bill is matter of scandal, or will subject the defendant to any pain, penalty, or forfeiture, he is not bound to make it; and if he does not think proper to defend himself from the discovery by demurrer, or plea, according to the circumstances of the case, he may *by answer* insist that he is not obliged to make the discovery. And if in this latter case the plaintiff conceives that he is entitled to the discovery, notwithstanding the matter set forth in the answer, he may *except* to it as insufficient, and upon that exception obtain the judgment of the court whether the defendant is or is not obliged to make the discovery sought for. (Mitf. Eq. Pl. 245.)

Where a bill in chancery *seeks relief*, the answer consists properly of two parts, namely, the *defence* of the case which is set forth in the bill, and secondly, the *examination* of the defendant on oath, as to the facts charged by the plaintiff, of which a discovery is sought. It combines, therefore, in one, two proceedings, which in the Roman law are completely separated; and the ambiguity arising from this source has led to some confusion. (Stor. Eq. Pl. § 850.)

It has already been remarked, that with us the answer is incomparably the most usual mode of making

defence to a bill, being generally employed where in England a demurrer or plea would be resorted to, as well as in the cases where in English practice it is deemed specially appropriate. There are many cases, however, in which an answer is not only the most appropriate, but the only mode of defence. Thus, where the defence consists, not of a single point or matter, but of a *variety of circumstances*, (in which case a plea is seldom, if ever, proper); or if it is doubtful whether the defence will hold as a plea; or although the matter, being a complete bar, might be offered as a plea, yet if the defendant, having no occasion to protect himself against any discovery sought by the bill, can present collateral circumstances favorable to his case, which he could not include in his plea; in all these cases, he may and ought to set forth the whole *by way of answer*, and pray the same benefit from it as if it had been pleaded. For example, if a purchaser for valuable consideration, without notice or fraud, has expended considerable sums on improvements, *with the knowledge of the adverse claimant*, who is now asserting against such purchaser, and occupant of the premises, a prior equity, whilst the defendant might present *by plea* the simple fact of having purchased the subject *bona fide*, for value and without notice, he could not by plea avail himself of the important auxiliary circumstance of the *improvements* made with the plaintiff's knowledge, so that the defence in such case should be *by answer*. (Mitf. Eq. Pl. 245-'6.)

It must not be forgotten, however, that according to the strict and general rule, the defendant who has occasion to protect himself against a *discovery* must resort to a plea or demurrer; for if he answers at all, he must in general *answer fully*, with some important exceptions, namely, where the discovery demanded involves matter of *gratuitous scandal or impertinence*, or would involve a *penalty or forfeiture* to the defendant, or a *breach of professional confidence* reposed in him as a legal adviser, or any disclosure of the *circumstances of his title* to real estate, where he claims as an innocent purchaser for value and without notice. (Stor. Eq. Pl. § 851, 847, & n (1), 846; Mitf. Eq. Pl. 245-'6; 2 Dan. Ch. Pr. 826, n (3); 2 Stor. Eq. § 1502 & seq; 2 Rob. Fr. (1st ed.), 307-'8; Jerrard v. Saunders, 2 Ves. Jr. 454, & n (a); Donnell v. King, 7 Leigh, 393; N. W. Bk. v. Nelson, 1 Grat. 127; Tompkins v. Mitchell, 2 Rand. 428; Wilcox v. Calloway, 1 Wash. 41; Meth. Church v. Jacques, 1 Johns. Ch. R. (N. Y.) 65; Cuyler v. Bogart, 3 Pai. (N. Y.) 186.) In the courts

of equity of the United States, the supreme court has prescribed as a rule, that the defendant may *in all cases* by answer insist upon all matters of defence *in bar of or to the merits* of the bill, of which he might avail himself by a *plea in bar*, so that, in the Federal courts at least, the caution is well nigh superfluous. (1 Abb. U. S. Pr. 139.)

The answer must respond to all the *material* allegations of the bill, either confessing and avoiding, or traversing *each one*, not *literally* only, but according to its *substance*. It is not enough that it contains a general denial of the matters charged, nor even of each specific matter severally. There must be an answer to each of the *specific and sifting interrogatories* propounded by the bill, at least, unless they are *clearly immaterial*, and an answer not only direct and without evasion, but as *certain in its allegations* as the nature of the case allows. (Mitf. Eq. Pl. 246-'7; Stor. Eq. Pl. § 852 & seq.) Hence, where a fact is charged which is within the defendant's own knowledge, as if it be done *by himself*, he must answer *positively*, and not to his remembrance or belief, at least if it is stated to have happened within such a time before as to make it reasonable that he should recollect it; and as to the facts which have not happened within his own personal knowledge he must answer as to his *belief* in respect to them, and not his *information* merely. (Mitf. Eq. Pl. 247; Stor. Eq. Pl. § 854 & seq; 2 Dan. Ch. Pr. 861-'2, & notes; Hall v. Wood, 1 Pai. (N. Y.) 404; Sloan v. Little, 3 Pai. 103.) And where the facts to which the interrogatory relates are more accessible to him than to the plaintiff, as when they are to be derived from *his agent*, he ought to inform himself, by inquiry of his agent, before he makes his answer, and state the result. (Stor. Eq. Pl. § 855 a; 2 Dan. Ch. Pr. 832 & n (2).)

A general and *merely formal charge* of combination and confederacy contained in the bill need not be answered at all, although it is customary to deny it in general terms. But where a combination is *particularly charged* as an actual part of the plaintiff's case, the defendant must answer it particularly and specifically, and a formal general denial of "*all combination*" is not sufficient. (Stor. Eq. Pl. § 856.)

A defendant is not *obliged* to answer to facts as to which he is interrogated, but which are not *charged or stated* in the bill; although if he does so answer, and the plaintiff replies, the facts thus set forth are properly in issue. But, of course, a very *general charge* may be a

sufficient foundation on which to rest a great number of special interrogatories, all of which must be fully responded to. Hence, when an account is demanded, if the bill avers such relations of business with the defendant as to justify the requiring of an account, the interrogatories may be as numerous and special as the plaintiff may think fit; and whether they are so or not, it will be necessary for the defendant to afford the fullest information touching the subject, and that not by long schedules but by the answer itself, with references, if need be, to accounts previously settled, and to other vouchers, so as to make them part of the answer, and to give the fullest opportunity for inspection and inquiry. (Stor. Eq. Pl. § 856; 2 Dan. Ch. Pr. 836, &c.)

Whilst a defendant is not bound to answer the allegations of the bill further than as concerns himself, yet if he does answer to a part of the circumstances, or state a part of a conversation, he will be compelled to set forth the whole, because the true import and legal effect of the transaction or conversation can be determined by nothing short of the whole. (Stor. Eq. Pl. § 857; Cookson v. Ellison, 2 Bro. C. C. 252, and n. (b); Ovey v. Leighton, 2 Sim. & Stu. (1 Eng. Ch. R.), 234; Cuyler v. Bogart, 3 Pai. (N. Y.) 186; Meth. Ep. Ch. v. Jacques, 1 Johns. Ch. R. (N. Y.) 65.)

An answer must not contain matter either *scandalous* or *impertinent*, and must, moreover, not be *insufficient*; upon each of which heads a few observations will be expedient, and

(1), As to *Scandal* in the Answer:

If an answer goes *out of the way* to state anything *scandalous*, the scandal will be expunged by order of the court. It is to be observed, however, that it is not the *nature* of the matter alone which makes it scandalous; for if the matter is relevant to the case made by the bill it cannot be, in the technical sense, *scandalous*. Hence, between scandal and impertinence there is an intimate relation, nothing being liable to be expunged from the answer as scandalous, unless it be also impertinent. (Stor. Eq. Pl. § 862; Coop. Eq. Pl. 318; Fenhoulet v. Passavant, 2 Ves. Sen. 24.) In the case of *Mason v. Mason*, 4 H. & M. 414, an indecent answer was referred to a commissioner, for the purpose of expunging from it the impertinent and scandalous matter, at the cost of the defendant who filed it, he having written it himself, and put it into the cause without his counsel's knowledge. The answer, which is as unique a paper probably as was ever submitted to a court of justice, has been preserved



by Mr. Sands in a note to his "Suit in Equity," a book which in a small compass contains a large amount of valuable practical learning.

(2), As to *Impertinence* in the Answer.

If an answer goes out of the bill to state some matter *not material to the defendant's case*, it is deemed *impertinent*, and upon application to the court the matter will be stricken out with costs, which, in strictness, are to be paid by the counsel who *signed the answer*, his signature being required, as we have seen, as a guaranty that the answer contains nothing improper. (Mitf. Eq. Pl. 47; Stor. Eq. Pl. § 863.) Thus it is impertinence to stuff the pleading with long recitals or schedules, or with needless digressions, or with statements of facts, or documents not sought for by, nor relevant to the bill; or with repetitions of former answers, or of an answer to the original bill in answering an amended bill. It should be observed, however, that whilst an answer cannot be scandalous, as we have seen, without being impertinent, it may be impertinent, as in most of the cases just indicated, without being scandalous. (Mitf. Eq. Pl. 248; Stor. Eq. Pl. § 863, 868; 2 Dan. Ch. Pr. 837-'8; Fenhoulet v. Passavant, 2 Ves. Sen. 24; Clay v. Williams, 2 Munf. 105.)

(3), As to *Insufficiency* in the Answer.

Wherever an answer is wanting in any of the qualities and attributes which we have seen ought to belong to it, it is liable to objection for *insufficiency*. Thus it is insufficient if it does not answer the material averments of the bill directly and without evasion; if it merely answers the charges literally and generally, but does not confess and avoid, or traverse the substance of *each charge*; if it answers any interrogatory argumentatively, and not positively and directly, &c. (Dan. Ch. Pr. 864 & seq; Woods v. Morrell, 1 Johns. Ch. R. (N. Y.) 103; Morris v. Barker, 3 Johns. Ch. R. 297; Smith v. Lasher, 5 Johns. Ch. R. 247; Davis v. Mapes, 2 Pai. (N. Y.) 105; N. Eng. Bank v. Lewis, 8 Pick. (Mass.) 113, 119; Coleman v. Lyne, 4 Rand. 454; Freeland v. Royall, 2 H. & M. 575; Craig v. Sebrell, 9 Grat. 131.)

Exceptions to an answer for insufficiency ought to be *in writing*, and ought to state with precision the particulars wherein the plaintiff considers the insufficiency to consist. The mode of doing it is dwelt on elaborately in the books of practice, to which it must suffice to refer, (2 Dan. Ch. Pr. 881 & seq; Stor. Eq. Pl. § 864, & n 6); adding only, that with us it is regarded as a matter of practice, to be regulated by the discretion of the court, and not a subject of appeal. (Craig v. Sebrell, 9 Grat.

131.) The exceptions having been stated, are set down to be argued, not before a master commissioner, as in England, but before the court itself; and if they are sustained, and the defendant shall put in a *second* insufficient answer, he may be examined upon interrogatories, and committed until he answers them. (Mitf. Eq. Pl. 250–251; Coleman v. Lyne, 4 Rand. 458; Dangerfield v. Claiborne, 2 H. & M. 17; V. C. 1873, c. 167, § 36, 37.) But no exception to an answer is allowable *after a replication* thereto. (Coop. Eq. Pl. 321–2; Coleman v. Lyne, 4 Rand. 458.) And it should be observed, that scandal and impertinence in an answer ought to be disposed of before its sufficiency is considered. (Stor. Eq. Pl. § 867.)

2<sup>d</sup>. The *time* when an Answer to a Bill ought to be filed, and Mode of *compelling* an Answer.

An answer ought regularly to be filed at rules, in the clerk's office, within *one month* from the *return day* of the process, or if that be the first of a term, then from the next rule day; or else the bill is taken *for confessed*, and the plaintiff (if he does not choose to compel an answer) may *set the cause for hearing*. (V. C. 1873, c. 167, § 43, 47, 49.) The defendant, however, at any time before final decree, *may* (that is, *must*), if he applies, be allowed to file his answer, or he may plead or demur, but not so as that the cause shall be sent to the rules, or continued therefor, unless good cause be shown therefor. (V. C. 1873, c. 167, § 35; Bowles v. Woodson, 6 Grat. 81–2; Bean v. Simmons, 9 Grat. 391.) In actual practice the answer is not, for the most part, filed until the term of the court ensuing the period when, as just explained, the bill is taken for confessed. It is supposed to be so in the case (*Ante*, p. 1110–'11,) whose history we are tracing.

But while the plaintiff *may* proceed to set the cause for hearing without an answer from the defendant, he is entitled to insist upon and compel an answer, if he desires one; that is, supposing the answer to involve no matter of gratuitous scandal or impertinence; nor of penalty or forfeiture to the defendant; nor any breach of professional confidence as a legal adviser; nor any disclosure of the circumstances of the defendant's title to land of which he claims to be a *bona fide* purchaser for value. The plaintiff may be influenced to require an answer, either because he cannot prove the facts by extrinsic testimony, or in aid of proof, and to avoid expense. (Mitf. Eq. Pl. 244–'5; Stor. Eq. Pl. § 845 & seq.)

The mode of compelling an answer is by *process of contempt*, that is by attachment and imprisonment, sequestration of defendant's property, &c. (1 Dan. Ch. Pr. 537 & seq; Sands' Suit in Equity, 413; *Post*, p.

& seq.) It is provided by statute in Virginia, that although a bill be taken for confessed as to any defendant, the plaintiff may have an *attachment* against him, or an order for him to be brought in to answer interrogatories. And no plea or demurrer shall be received after such attachment, unless *by order of court*, upon motion. So if a defendant, after process of contempt, *answer insufficiently*, the plaintiff may go on with the subsequent process of contempt, as if no answer had been filed. (V. C. 1873, c. 167, § 47, 48; Lane v. Ellzey, 4 H. & M. 505.)

3<sup>d</sup>. The *Form and Structure* of an Answer to a Bill, and *its Effect*.

Let us, under this head, take notice of (1), The several formal parts whereof answers are usually composed; (2), The framework of an answer; and (3), Its effect; W. C.

1<sup>h</sup>. The *Several Formal Parts* whereof Answers are usually composed.

These formal parts are (1), The caption; (2), The reservation of exceptions to the bill; (3), A distinct and categorical answer to the bill; (4), A general traverse or denial of the averments of the bill; and (5), The conclusion: (Mitf. Eq. Pl. 249; Stor. Eq. Pl. § 869, 870; Sands' Suit in Eq. 389.); W. C.

1<sup>l</sup>. The *Caption*.

The caption shows the name of the respondent, and the *character* in which he answers, that is, whether in his personal, or in some fiduciary capacity, or in both; and describes the bill which it is designed to answer by the name of the plaintiff, and of the court wherein it is exhibited. Two or more persons may join in the same answer, and where their interests are identical, and they appear by the same counsel, it is proper that they should do so. A joint answer ought to be sworn to by *all the parties to it*; but if that be not done, and a general replication thereto be filed, and no exception taken, it will be a sufficient foundation for a decree. (Stor. Eq. Pl. § 869, 870; Coop. Eq. Pl. 323; Freeland v. Royall, 2 H. & M. 575.)

2<sup>l</sup>. A Reservation of *all just Exceptions to the Bill*.

The reservation to the respondent of all advantages which may be taken by exception to the bill, was

probably intended to prevent a conclusion that the defendant admits everything which the answer does not expressly controvert, and especially such matters as he might have objected to by demurrer or by plea. It seems, however, to be superfluous, it being a rule that those allegations in the bill which are not noticed are not to be considered as admitted. (Mitf. Eq. Pl. 249; Coop. Eq. Pl. 323; *Coleman v. Lyne*, 4 Rand. 454.)

3<sup>d</sup>. A distinct and Categorical *Answer to the Bill*.

The answer must be distinctly applicable to each several averment of the bill, according to the defendant's *knowledge, remembrance, information and belief*, accompanied by such qualifications and counter-statements as may be necessary, together with a denial of all fraud and combination. (Mitf. Eq. Pl. 249; Coop. Eq. Pl. 323-4.)

4<sup>d</sup>. A *general Traverse or Denial* of all Matters contained in the Bill.

In England, it is said to be the *universal practice* to insert in the answer a general traverse or denial of all the matters contained in the bill; a practice which seems to have originated when the usage was for the defendant merely to set forth his case without answering every clause in the bill, and which is admitted to be not only unnecessary, but rather impertinent if the bill is otherwise fully answered. (Mitf. Eq. Pl. 249; Coop. Eq. Pl. 324.) As in the looser proceedings tolerated in our courts, the distinct and categorical answer to every averment of the bill required by the preceding clause is not unfrequently omitted, it is well to retain this fourth part, for the reason which first suggested it, although in fact it is not usually found in answers with us. (*Sands' Suit* in Eq. 390.)

5<sup>d</sup>. The *Conclusion* of the Answer.

The conclusion of the answer simply prays that the respondent having fully answered, may be *thence dismissed* with his reasonable costs. (*Sands' Suit* in Eq. 390.)

2<sup>b</sup>. The *Form or Framework* of an Answer.

Before exhibiting the actual form or frame-work of an answer, it will be expedient to make some observations upon certain cases which require special *formulae*, such as the answer of an infant by guardian *ad litem*, of an idiot or lunatic, and of a married woman, and also upon the affidavit by which an answer must be verified.

The answer of an infant is expressed to be made by his guardian *ad litem*, of an idiot or lunatic by his committee or his guardian *ad litem*, and of a married woman, by her husband, or if he is her adversary in the cause, by her *next friend*, of all which instances will be presently given.

The answer of an *infant* defendant usually omits the general reservation at the beginning, the denial of combination, and the general traverse constituting the fourth part of the answer as above stated; for which the reason is that an infant is entitled to the benefit of every exception to the bill, notwithstanding he does not expressly reserve it; he is in law incapable of an unlawful combination; his answer cannot be excepted to for insufficiency; and no admission made by him has any binding force; nor indeed, can his answer be read against him *for any purpose*. (Stor. Eq. Pl. § 871; Bank of Alexandria v. Patton, 1 Rob. 500.)

The answer of an *idiot or lunatic* defendant, or of one reduced by age or infirmity to a *state of imbecility*, is expressed to be made by his *committee*, or by his guardian *ad litem*, appointed by the court to defend him in the suit. (Coop. Eq. Pl. 325; V. C. 1873, c. 167, § 17.)

A married woman generally answers *with her husband*; but when her husband is her *adversary* in the suit, or when for some satisfactory reason, the court shall order her to answer separately, she answers by her *next friend*. (Stor. Eq. Pl. § 873; Coop. Eq. Pl. 325.)

An answer is always to be authenticated by the respondent's oath or affirmation, unless in case of an aggregate corporation, (when it is under the corporation seal,) or unless the plaintiff shall think fit to dispense with it, and then it seems that there ought to be an *order of court* to receive the answer without an oath, which if the parties agree to it, is of course. (Coop. Eq. Pl. 325; 2 Dan. Ch. Pr. 846; Sitlington v. Brown, 7 Leigh, 274.) Thus, in the case last named, of Sitlington v. Brown, an answer which had been filed with the papers, it did not appear *by whom*, and which purported to have been sworn to, but was certified by a person who was not shown by the certificate or otherwise to be a justice of the peace, or otherwise authorized to administer an oath, *was rejected*, notwithstanding it was adverse to the respondent's in-

terest, and admitted substantially the truth of the bill!

As to the mode of administering the oath or affirmation, it may be observed that a Jew is sworn on the *Pentateuch*, (or five books of Moses,) and *with the head covered*; a Mahometan on the Koran, and in short each respondent according to the peculiar ceremonies of his own religion, and in such manner as he considers binding on his own conscience. If nothing appears to the contrary he is supposed to be a believer in Christianity, and may be sworn on the New Testament. (1 Phill. Ev. 8, 9; 1 Whart. Ev. § 387; *Omychund v. Barker*, 1 Atk. 40 & seq; S. C. Willes, 540; *Atcheson v. Everitt*, Coop. 389-'90.) In case of a foreigner not acquainted with English, an order of court should be obtained for an interpreter, and the answer should be in the respondent's own language, and having been sworn to by him, the interpreter, (being first sworn, and the affidavit annexed,) makes a translation, and then communicates to the respondent the terms of the oath, and himself swears to the fidelity of the translation. And a similar practice is generally adopted in case of affidavits and depositions by foreigners unacquainted with English, although they, it seems, have been sometimes admitted in the foreign language alone, unaccompanied by a translation. (Coop. Eq. Pl. 326; 2 Dan. Ch. Pr. 1103; *Simmonds v. Countess Du Barré*, 3 Bro. C. C. 263; *Belmore v. Anderson*, 4 Do. 90; *St. Katherine Dock Co. v. Mantzgu*, 1 Colly. (28 Eng. Ch. R.) 96.)

When an oath is not required there ought generally to be the *signature of the defendant* to the answer, in order to connect him therewith; but under peculiar circumstances, where casually the signature has been omitted, and could not be procured without expense and delay, it may, in the court's discretion, be dispensed with. And in all cases, as we have seen, the answer should be *signed by counsel* as a guaranty of the propriety of its contents. (Mitf. Eq. Pl. 250; Coop. Eq. Pl. 326-'7; Stor. Eq. Pl. § 875.)

There will be now exhibited *formulae* for the several parts of the answer above set forth; *formulae* for the essential parts as used in the practice in Virginia; and lastly, such an answer as would be adapted to the case mentioned, *Ante*, page 1110-'11, which is supposed to be in the course of prosecution.

## 1. FORMULÆ FOR THE SEVERAL PARTS OF THE ANSWER.

## I. THE CAPTION.

(1), *The Ordinary Form of Caption.*

The answer of —, the defendant, [or "the separate answer of —, one of the defendants," or "the joint and separate answers of —, the defendants,"] to a bill of complaint exhibited against him, [or, "her," or "them,"] ["and others,"] in the — court of the county [or "corporation,"] of —, by —, complainants.

(2), *Form where Defendant is an Infant.*

The answer of —, an infant under the age of twenty-one years, by —, her guardian *ad litem*, assigned to defend her in this suit, to a bill of complaint exhibited against the said — (the infant), ["and others,"] in the — court of the county [or "corporation"] of —, by —, complainant.

(3), *Form where the Christian Names of Defendants are Mis-stated.*

The joint and several answers of D. D. and E. F. (called in the bill of the complainant X. Z. and W. Y.), and G. H., to a bill of complaint exhibited against them ["and others"], in the — court of the county [or "corporation"] of —, by —, complainant.

(4), *Form where one Answers in his own Right, and also in autre droit.*

The answer of D. D. in his own right, and also as administrator of all and singular the goods, chattels, and credits which were of X. Z. deceased, at the time of his death, who died intestate, and also of the said D. D., as guardian of V. W., an infant under the age of twenty-one years, to a bill exhibited against him in his own right, and as such administrator and guardian as aforesaid, by —, in the — court of the county [or "corporation"] of —.

(5), *Form of the Answer of Husband and Wife.*

The joint answer of D. D. and Mary, his wife, to a bill of complaint exhibited against them ["and others"], by —, complainant, in the — court of the county [or "corporation"] of —.

(6), *Form of a Supplemental [or "further"] Answer.*

The supplemental [or "further"] answer of D. D., to a bill of complaint exhibited, &c.

(7), *Form of a Plea and Answer.*

The plea and answer of D. D., a defendant to the bill of complaint exhibited against him by P. P., in the — court of the county [or "corporation"] of —.

This defendant, by protestation, not confessing or acknowledging all or any part of the matters and things in the said bill of complaint to be true, in manner and form as the same are therein set forth, for plea nevertheless, to the said bill, doth plead and aver, &c.

[State the substance of the plea, whether in abatement or in bar, the beginning and conclusion of both sorts being, as we have seen, the same.]

Wherefore this defendant prays judgment of this court, whether he shall be compelled to make any further or other answer to the said bill, and prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

And for answer to the said bill, or to so much thereof as he is advised that it is material to answer, the said defendant reserving to himself the benefit of all just exceptions to the said bill, answers and says, &c.

See Sands' Suit in Equity, 389.

## II. THE RESERVATION OF JUST EXCEPTIONS.

The respondent, saving to himself the benefit of all just exceptions to the said bill, for answer thereto, or to so much thereof as he is advised that it is material he should answer, answers and says that, &c.

See Sands' Suit in Equity, 390.

## III. THE DISTINCT AND CATEGORICAL ANSWER TO THE BILL.

This part varies, of course, with each case. See Sands' Suit in Equity, 391 & seq; *Post* p.

## IV. THE GENERAL TRAVERSE OR DENIAL OF ALL THE MATTERS OF THE BILL.

And this respondent denies all manner of fraud, unlawful combination and confederacy, wherewith by the said bill he is charged, without this that there is any other matter, cause or thing in the said bill contained, material or necessary for this defendant to make answer unto, and not herein answered, confessed, confessed and avoided, traversed or denied, which is true to the knowledge or belief of this respondent; all which matters and things this respondent is ready and willing to maintain and prove as this court shall direct, &c.

But in Virginia, instead of this form, a much briefer one is usual, namely:

And this respondent denies all fraud, unlawful combination and confederacy, and having fully answered the complainant's bill, &c.

See Sands' Suit in Eq. p. 390.

## V. THE CONCLUSION OF THE ANSWER.

And having fully answered the complainant's bill, the said respondent prays to be hence dismissed with his reasonable costs by him in this behalf expended, and he will ever pray, &c.

## 2. FORMULA FOR THE ESSENTIAL PARTS OF THE ANSWER IN VIRGINIA.

See Sands' Suit in Eq. 390-'91; Van Heythuysen's Eq. Draftsm. 563-'4, 565 & seq.

<i>Caption.</i>	The answer of _____, the defendant, [or "The separate answer of _____, one of the defendants," or "The joint and separate answers of _____, the defendants"] to a bill of complaint exhibited against him [or "her," or "them,"] ["and others,"] in the _____ court of the county [or "corporation"] of _____, by _____, complainant.
<i>Reservation of exceptions.</i>	The respondent [or "these respondents"] reserving to himself [or "themselves"] the benefit of all just exceptions to the said bill for answer thereto, or to so much thereof as he is [or "they are"] advised that it is material he [or "they"] should answer, answers and says, [or "answer and say,"] that—
<i>Distinct Ans. to the bill.</i>	True it is, &c., [ <i>giving a distinct and categorical answer to the several averments of the bill.</i> ]
<i>General denial, &amp;c.</i>	And this respondent denies, [or "these respondents deny,"] all fraud, unlawful combination and confederacy; and having fully
<i>Conclusion.</i>	answered the complainant's bill, prays [or "pray"] to be hence dismissed with his [or "their"] reasonable costs by him [or "them"] in this behalf expended, and he [or "they"] will ever pray, &c.

W A. W., p. d.

(Signed)

D. D., Defendant.



*Affidavit.*

Virginia :

County [or "corporation"] of A, to-wit :

This day personally appeared before me, H. R., a justice of the peace [or "notary public," &c.] for the county [or "corporation"] and State aforesaid, D. D., [or "D. D. E. F., &c., including all the respondents,] whose answer is above written, and made oath that the statements contained in the said answer, so far as made of his [or "their"] own knowledge are true ; and so far as made from knowledge or information derived from others, he [or "they"] believes [or "believe"] to be true.

Given under my hand this ——— day of ———, in the year  
————— (Signed,) H. R., J. P.

### 3. FORMULA FOR AN ANSWER ADAPTED TO THE CASE UNDER PROSECUTION, AS MENTIONED *Ante*, p. 1110-'11.

See Sand's Suit in Eq. 391 & seq ; Van Heythuysen's Eq. Draftsman, 569 & seq.

(1), *Answer of the Widow and Administratrix.*

*The caption.*

The separate answer of Jane Hart, in her own right, and also as administratrix with the will annexed of Thomas Hart deceased, to a bill of complaint exhibited against her and others, in the circuit court for the county of A, by James Hart :

*Reservation of exceptions.*

The respondent reserving to herself the benefit of all just exceptions to the said bill, for answer thereto, or to so much thereof as she is advised it is material that she should answer, answers and says :

*Distinct answer to averments of bill.*

That true it is the said Thomas Hart died at the time alleged in the bill, leaving a will as therein stated, and leaving as his heirs and distributees the parties therein named, and the respondent, his widow ; that the respondent became, as in the bill is stated, the said Thomas' administratrix with the will annexed, and that in that capacity personal estate to a considerable amount came to her hands to be administered, whereof a true inventory and appraisalment is exhibited with the bill. But the respondent denies wholly so much of the allegations of the said bill as would tend to fix any mal-administration of the assets of the estate upon her. It is not true that the estate of the said Thomas Hart deceased was but little in debt. On the contrary, she avers that thus far she has had great difficulty, by pledging her individual credit, to prevent the said estate from ending, by reason of forced sales, in utter insolvency. At this very time, the said estate is indebted partly to the respondent for advances made by her, and partly to other persons, to an amount exceeding, as the respondent believes, any cash price which could be obtained for all the assets now unadministered ; and it is by very cautious management alone, and by postponing sales to more auspicious times, that a remnant can be saved for the persons concerned, if indeed it can be done at all.

The respondent had acted throughout her administration until lately, with the concurrence and thanks of the complainant and of the other parties interested ; and as she was thus assured of their approval, and had realized a very small amount of the assets in money, she was induced to think, in the ignorance of business incident to her sex, that a formal settlement of her administration-accounts would be superfluous, and should the complainant un

generously insist upon it, she has nothing to allege why she should not suffer the penalty of the forfeiture of all compensation for the past transactions of her administration. She denies, however, that her failure to settle her accounts periodically, as required by law, ought to be imputed to her as more than a technical or constructive *laches*, and she avers that no actual loss or injury to any one has resulted, or will result from it. She concurs with the complainant in desiring that the accounts of her administration may be settled before a commissioner of this court, and doubts not that she will be able to show that she is very largely in advance to the estate.

As to the complainant's allegation that the respondent is about to sell the chattels specifically bequeathed to the complainant by her decedent's will, to persons who will convey them to other and remote states, it is true that the respondent, as was her right and duty, intended shortly to make sale of a portion, or if necessary of all the chattels, belonging to the estate of her said decedent (giving, however, their legal priority and preference to those specifically bequeathed), in order to discharge the demands against the said estate which were most urgent, the same being payable partly to third persons, and partly to the respondent herself, for debts paid by her to creditors, out of her own funds. It is also true that the respondent intended, as was her duty, to make such sale at public auction, to the highest bidder, and conjectured it to be possible,—although without correspondence or communication of any kind with any one,—that the highest bidder might be some person who might be disposed to remove the chattels purchased, and especially the blooded mares in the bill mentioned, to another State. She avers that her sole and exclusive intention and wish were to sell the said chattels for the best price, in order to pay the debts of her said decedent, and confidently believes that her conduct and designs cannot be the subject of reasonable complaint or objection on the part of the complainant or any body else.

The respondent denies emphatically that she ever claimed, or thought of claiming, a right to sell any of the chattels of her decedent, as being part of her distributive share of his estate. Reluctant to believe the complainant to have made and sworn to a statement deliberately untrue, she can only account for his strange misrepresentation to that effect, by supposing that he misunderstood her, when, in a late interview with the complainant, she sought to convince him of the improbability that she would intentionally sacrifice the interests of the estate whereof she was herself the principal distributee.

The respondent cannot forbear to express some surprise at the charge contained in the complainant's bill respecting the *real estate* of her decedent. True it is, she has remained since her husband's death in possession of his mansion house, and conjointly with the complainant, and with her co-dependents, Henry Wells, and Mary, his wife, and Anne Hart, of the farm thereto belonging, constituting the whole of her decedent's real estate, and she is advised that she had a perfect right so to do, without being chargeable to pay any rent for the same, her dower never having been

even yet assigned her. But besides the groundlessness of the complaint, considering the respondent's legal and undoubted rights, more than ordinary hardihood is exhibited in referring to it at all, inasmuch as, although the respondent was entitled by law to the exclusive occupancy of the said mansion house of the decedent, and to one-third of the rents and profits of the lands for her own use, yet she has freely afforded a shelter and a home to the complainant, and her co-defendants above named, and certainly never at any time received as much as one-third of the profits of the lands. As soon as her dower is assigned, (which she unites in praying may be done without delay,) she is quite willing to take her portion in severalty, and has neither the power nor the inclination to obstruct the partition of the residue among the heirs of her said husband.

*General denial, &c.* The respondent denies all fraud, unlawful combination and confederacy; and having fully answered the complainant's bill, prays

*Conclusion.* to be hence dismissed with her reasonable costs in this behalf expended, and she will ever pray, &c.

T. R. B., p. d.

(Signed,) JANE HART.

*Affidavit.*

Virginia:

County [or "Corporation"] of A, to-wit:

This day personally appeared, &c., [as *Ante*, p. 1188.]

(2), *Answer of the other Adult Defendants.*

~~3~~ The same in form, as that of the widow, &c.

(3), *Answer of the Infant Defendant.*

The separate answer of Anne Hart, an infant under the age of twenty-one years, by B. T., her guardian *ad litem*, assigned to defend her in this suit, to a bill of complaint exhibited against her and others, in the circuit court for the county of A, by James Hart:

The respondent, reserving to herself the benefit of all just exceptions to the said bill, for answer thereto, or to so much thereof as she is advised that it is material she should answer, by her said guardian *ad litem*, answers and says:—

That she is an infant of tender years, and by reason of her infancy, is incapable of understanding, or of taking care of her rights and interests. She, therefore, by her said guardian, commends herself and her rights and interests to the protection of the court, and prays that no decree may be pronounced which will tend to her prejudice.

And having fully answered, the said respondent prays to be hence dismissed with her reasonable costs in this behalf expended, and she will ever pray, &c.

(Signed,) B. T., Guardian *ad litem* for Anne Hart.

C. O. B., p. d.

It is not usual, when the infant's answer is merely *formal*, as it is here, for the guardian to make affidavit to it; but when full defence is made by the guardian in behalf of the infant, it would seem most proper that the answer should be verified as usual, by the guardian's affidavit. The guardian should always *sign* the answer.

### 5<sup>th</sup>. The Effect and Force of an Answer to a Bill.

The effect of an answer in evidence is very potent. It is not, in general, available either for or against a co-defendant, (*Hoomes v. Smock*, 1 Wash. 392); but as against the plaintiff, so far as it is responsive to the allegations of the bill, it is not only evidence for the respondent, but is *conclusive evidence*, unless contradicted by the testimony of two witnesses, or of one witness and clear corroborating circumstances. (2 Stor. Eq. § 1528; Stor. Eq. Pl. § 849, a 875; 2 Dan. Ch. Pr. 983 & n. (2); *Marpin v. Whiting*, 1 Call. 224; *Pryor v. Adams*, 1 Call. 388 & seq.; *Burk v. Copland*, 2 Call. 229; *Bullock v. Goodall*, 3 Call. 49; *Hoomes v. Smock*, 1 Wash. 389; *Thornton v. Gordon*, 2 Rob. 719; *Fant v. Miller*, 17 Grat. 187; *Shurtz v. Johnson*, 28 Grat. 665.) And if part of the answer be thus disproved, namely, by two witnesses, or by one witness and clear corroborating circumstances, the only effect is to destroy the weight of the answer to the extent of that part, the residue remaining, notwithstanding the maxim of "*Falsum in uno, falsum in omnibus*," in unimpaired force. (*Fant v. Miller*, 17 Grat. 187; *Powell v. Manson*, 22 Grat. 189.) It may be further remarked, that this doctrine as to the effect of an answer, so far as it is responsive to the bill, is applied as well in case of an issue out of chancery tried by jury as to an issue in the court of chancery itself. (*Powell v. Manson*, 22 Grat. 191.)

It is of some importance to observe the reason of this universally admitted principle. By some the reason is stated to be, that the plaintiff having called upon the defendant to answer an allegation of fact, thereby accredits his veracity, and admits the answer to be evidence of the fact, at least equal to the testimony of any other witness; and as the plaintiff cannot prevail unless the proof preponderates in his favor, he must either have two witnesses, or some circumstances in addition to a single witness, in order to turn the balance. (2 Stor. Eq. § 1528.) If this were the true reason, then if the plaintiff should expressly disclaim any confidence in the defendant's truthfulness, or any wish to have his statements, it would seem to follow that the answer would have no more weight attached to it than a plea of denial in a court of law, which only makes up the issue between the parties. Accordingly, in *Thornton v. Gordon*, 2 Rob. 721, it was so insisted, counsel relying upon Judge Story's authority, and also upon a dictum of Green, J., in *Taylor v. Moore*, 2

Rand. 576, and of Thompson, J., in *Union Bank v. Geary*, 5 Pet. 111-'12; but the conclusion was negatived by the court, which declared that "it was the *law of the forum* (derived no doubt from the Roman law, which usually required *two witnesses* to prove any disputed fact), and that all who applied to the forum (of chancery) for relief must submit to have their causes tried according to its established modes of procedure." (*Thornton v. Gordon*, 2 Rob. 725-'6.)

In the application of this principle questions have been raised as to the effect of the answer when it was *not sworn to*, and also where it was not *positively contradictory* of the averments of the bill, but *evasive*. In respect to the *first case*, where the answer is *not sworn to*, supposing the oath to have been dispensed with, it would seem upon principle, and especially upon the doctrine in *Thornton v. Gordon*, above cited, that the issue being joined by means of the answer, the *law of the forum* would exact a like measure of proof in opposition to the answer, as if it had been made under oath; and of that opinion was *Ld. Eldon*, in *Curling v. Thompson*, 19 Ves. 630-'31. But see an elaborate *dictum* to the contrary in *Union Bk. v. Geary*, 5 Pet. 111-'12, and also *Smith v. Clarke*, 4 Pai. (N. Y.), 504. As to the *second case*, where the answer is *evasive*, and not *positively contradictory* of the averments of the bill, it seems that, although not excepted to on that account, it may be outweighed by the "testimony of one witness and *circumstances*." (*Wilkins v. Woodfin*, 5 Munf. 184.)

Where an answer responds to some of the allegations of the bill, and omits to notice others, it seems the better opinion that the allegations not noticed are not to be considered as admitted, but are to be *proved by the plaintiff*. (*Coleman v. Lyne*, 4 Rand. 454; *Cropper v. Burton*, 5 Leigh. 426.) There are cases, however, which assume that the averments of the bill not denied or noticed by the answer, are considered to be admitted as true, and need no further proof. (*Page v. Winston*, 2 Munf. 298; *Scott v. Gibbons*, 5 Munf. 86.) But the proper course, as we have seen, is to *except* to the answer for *insufficiency*. (*Coleman v. Lyne*, 4 Rand. 454.)

If a cause comes on to be heard upon bill and answer merely, *without any replication* thereto, the answer is to be taken to be true, it seems, in *all its parts*, (*Kennedy v. Baylor*, 1 Wash. 163; *Pickett v. Ohlton*, 5 Munf. 467); but in general it is not evidence for the

respondent, when it asserts a right affirmatively, in opposition to the plaintiff's demand. The facts thus asserted must be established by *independent and satisfactory proof*. (2 Stor. Eq. § 1529; Paynes v. Coles, 1 Munf. 573; Vathir v. Zane, 6 Grat. 246.) And hence the personal representative of a decedent, when called to account for his administration, is not permitted by his answer to swear himself into a title to part of the decedent's estate. (Beckwith v. Butler, 1 Wash. 224.) The utmost effect allowed to an answer which admits a charge against the respondent, and seeks to discharge him therefrom, is where the whole is stated as *one transaction and in one sentence*, as that on a particular day he received a sum of money, and paid it over. But if he admits the receipt of money on a particular day, and says that on a *subsequent day* he paid it over, his admission is taken to be true, and he *must prove* the matter in discharge. (Thompson v. Lambe, 7 Ves. 587, & n (b); Ridgeway v. Darwin, 7 Ves. 404; Robinson v. Scotney, 19 Ves. 584; Hart v. Ten Eyck, 2 Johns. Ch. R. (N. Y.), 62, 87, 98.) But this principle does not prevent its being requisite to *read the entire answer*, when it is in part responsive to the bill, and in part asserts an independent claim; not indeed to have as to the latter matter the potent force which it is acknowledged to have as to the former, but to avail as it may, according to the impression which such an averment is, under the circumstances, fitted to produce upon a candid mind. And this, be it observed, is no more than the common rule of evidence that the *whole* of what one says *at the time* is to be stated, (whether credited or not), and not so much only as may tend adversely to his interests, for one part may materially qualify another. (Fletcher v. Froggat, 2 Carr. & P. (12 E. C. L.) 569; Randle v. Blackburn, 5 Taunt. (1 E. C. L.) 245; Hill v. Chapman, 2 Bro. C. C. 612; Blount v. Burrow, 1 Ves. Jr. 547; Morrison v. Grubb, 23 Grat. 348 & seq.) Hence in the last named case of Morrison v. Grubb, where the answer admitted the possession of certain chattels which had belonged to a decedent recently before his death, but which the respondent averred the decedent had given him in his life-time, and in his last illness, shortly before he died, the whole answer was *taken together*, because, as the court remarked, it would be "improper to allow the first part of his declaration as to the possession, and to exclude the latter part as to the means by which he obtained it."

A distinction, however, in respect to this subject is to be noted in case of a bill filed *merely for discovery*. The answer is then to be treated as the *testimony of a witness*; and no part of it pertinent to the discovery is to be rejected because it is affirmative matter in avoidance of that which is admitted to be true. But it is subject to be discredited in the same manner as the testimony of any other witness, by extrinsic contradictory proof, or by its context, &c. (*Lyons v. Miller*, 6 Grat. 427, 439.)

In respect to the *amendment of answers* it is to be observed that, as answers are verified by the *respondent's oath*, an amendment of them (as is the case also with pleas which are sworn to) is, for obvious reasons, not easily admitted. In mere matters of form, or mistakes of dates, or verbal inaccuracies, which the court is satisfied have occurred through inadvertence, there is considerable indulgence in allowing amendments; but in respect to material facts, or where it is sought to change essentially the grounds of defence taken in the original answer, amendments are admitted with great reluctance. To support such applications the court requires very cogent circumstances, and such as repel the notion that the defendant designs to evade the justice of the case, or to set up new and ingeniously contrived defences and subterfuges; and especially averse is the court to admit amended answers letting in new facts and defences wholly dependent upon *parol evidence*, because to allow such changes of sworn statements has a natural tendency to encourage carelessness and indifference in making them, and leaves too much room open for the introduction of averments and evidence manufactured for the occasion. Where, however, the new facts proposed to be set forth in the amended answer are contained in *documents* which have been omitted and overlooked by accident or mistake, less rigor is observed, because the same reason does not apply, seeing that the documents must speak the same language last as first. And upon like principles an answer is allowed to be quite freely amended in order to admit the defence of any *statute*, such as the statute of limitations. (*White v. Turner*, 2 Grat. 502, 505. *Coop. Eq. Pl.* 336 & seq.; *Stor. Eq. Pl.* § 896 & seq.)

The whole matter of amendments rests in the sound discretion of the court. In general, however, the indulgence is confined to cases of *mere mistake or surprise*; and a distinction is also made between the allowance of an amendment as to a *matter of fact*, and

as to a *conclusion in law*, an amendment as to the latter being much more freely allowed. (Coop. Eq. Pl. 337 & seq.; Stor. Eq. Pl. § 896, 897; Pearce v. Grove, 1 Ambl. 65; Patterson v. Slaughter, 1 Ambl. 292; Harcourt v. Sherrard, 2 Vern. 434 and n. (1); Dolder v. Bank of England, 10 Ves. 285; Wells v. Wood, 10 Ves. 401; Roemer v. Simon, 5 Otto. (95 U. S.) 220.)

Formerly, when applications to amend were granted, the practice was to take the old answer off the file, and to substitute the new one; but in more recent times, a better course, inaugurated by Lord Thurlow, has been adopted, of allowing a *supplementary answer* explanatory or amendatory of the first to be put in, so that *both remain on file*. (Coop. Eq. Pl. 339; Curling v. Townsend, 19 Ves. 631-'32; Rules Supreme Court of United States, 1 Abb. U. S. Pr. 142.)

Upon the hearing of a cause, where it appears that the answer has not put in issue the facts *necessary to a proper decision*, the court, in order to remove the embarrassment, permits an amendment of the answer to be made hardly less freely than of the bill; but this is only with a view to save expense, and where no injury can arise to other parties from the indulgence. (Mitf. Eq. Pl. 262-'3.) And upon like grounds, when a fact which may be of advantage to a defendant has happened *subsequently to the filing of his answer*, although it cannot, with propriety, be put in issue by *amending* his answer, yet the court, upon its so appearing at the hearing, will continue the cause until the plaintiff shall file a new bill, which shall put the fact in issue, and shall bring the same to a hearing along with the original suit. (Coop. Eq. Pl. 340.)

4<sup>th</sup>. The manner of *Objecting to the Sufficiency of an Answer*, and of *Supplying its Deficiencies*.

What amounts to insufficiency in the answer, and the mode of objecting to it by *exceptions in writing*, and the doctrine touching the subject, has been already expounded (*Ante*, p. 1180-'81), and cannot be again touched upon. See Mitf. Eq. Pl. 250 & seq; Coop. Eq. Pl. 319 & seq; Stor. Eq. Pl. § 864 & seq.

3<sup>rd</sup>. The *Replication by the Complainant*, and its *Consequences*.

After the defendant has put in his plea or answer, the plaintiff must determine whether the answer or the plea is sufficient, and also whether he will amend his bill. If he neither excepts to the answer nor to the plea for insufficiency, nor amends his bill, the usual step next taken by him is to *file a replication*, which is the avoidance or denial of the



answer or plea, and in maintenance of the bill, to draw the matter to a *direct issue*, to be proved or disproved by testimony. (Coop. Eq. Pl. 328-'9; Stor. Eq. Pl. § 877; Mitf. Eq. Pl. 255 & seq.)

When the plaintiff has thus put in his replication to the answer or plea, he has thereby admitted *its sufficiency*, and cannot except to it for insufficiency, however gross its imperfections, although he is sometimes allowed, when the justice of the case clearly requires it, to *withdraw his replication*, upon condition of paying the costs thereby incurred, in order that he may be in a condition to except. (Coop. Eq. Pl. 328; Coleman v. Lyne, 4 Rand. 454.)

Where the defendant, by his answer, admits the plaintiff's case, or such material part thereof as enables the latter to go to hearing without the examination of witnesses, no replication is needful; but as in such case the defendant, by the absence of a replication, is precluded from substantiating the answer by evidence, *the whole of it is taken to be true*, and it therefore behooves the plaintiff to look attentively into the answer, to see that the effect of the admissions therein is not avoided by the new matter which it may contain. (Coop. Eq. Pl. 329; 2 Rob. Pr. (1st ed.) 312, 404; Kennedy v. Baylor, 1 Wash. 162; Pickett v. Chilton, 5 Munf. 467; Coleman v. Lyne, 4 Rand. 456; Shirley v. Long, 6 Rand. 764.)

Formerly, replications in equity were either *general* or *special*, as at law they still are. A *general* replication, which alone is now used in equity, is a *general denial* of the defendant's plea or answer, and an assertion of the truth and sufficiency of the bill. A *special* replication is the averment of some additional fact by the plaintiff, in order to avoid new matter introduced by the defendant; and it seems was in use in Lord Nottingham's time, during the reign of Charles II, (about A. D. 1680). The consequence of a special replication was a *rejoinder*, which either traversed the replication, or confessed and avoided it in turn by new matter, and then might come in like manner successively, a *sur rejoinder*, a rebutter, and *sur-rebutter*, as at law. But the inconvenience, expense and delay of these proceedings, as it is said, have occasioned a change of practice, and the total abandonment of special replications, *amendments of the bill* being substituted in the room thereof. It has accordingly passed into a *rule* that the plaintiff is to be relieved according to the *case stated in his bill*, either *original* or *amended*. (Coop. Eq. Pl. 329-30; Rules Supreme Ct. of U. States, 1 Abb. U. S. Pr. 140.)

The plaintiff in Virginia seems to be under no *obligation*

to file any replication at all, however unwise it may be not to do so, being expressly allowed to set the cause for hearing upon the answer, or upon a general replication thereto, as he may prefer. (V. C. 1873, c. 167, § 49.) And it is also expressly enacted, that "no decree shall be *reversed* for want of a replication to the answer, where the defendant has taken depositions as if there had been a replication." (V. C. 1873, c. 177, § 4.) And it is further provided, that if four months elapse after the answer is filed, without the case being set for hearing by the plaintiff, and without exceptions being filed, the defendant may have the cause set for hearing as to himself. (V. C. 1873, c. 171, § 48.) It is supposed that if in such a case there is no replication, the answer will be taken as *wholly true*, as it is when the *plaintiff* sets the cause for hearing without a replication; but the point is not likely to arise *in practice*, as it is the custom for the clerk to enter a general replication, *as of course*. (Sands' Suit in Eq. 79, 80.)

In the practice of the United States courts, the replication is understood to be *indispensable*, in order to make up the issue, as logically it ought to be. (Rules Supreme Ct. of U. States, 1 Abb. U. S. Pr. 143.)

The general replication in Virginia is always put in orally, and with us, as was just remarked, by the clerk as a *matter of course*. A similar practice is said to prevail in the circuit court of the United States at Richmond; but the terms of the 66th rule of the Supreme court seem clearly to import that it should be *in writing*. (Sands' Suit in Eq. 78, n \*; 1 Abb. U. S. Pr. 143.)

#### SECTION IV. *Of the Decree.*

##### 4<sup>d</sup>. The Decree.

The doctrines applicable to decrees may be expounded under the several heads of, (1), The general nature of a decree in chancery; (2), The conditions to be sometimes named in decrees; (3), The terms of a decree; (4), The reservations to be sometimes inserted in decrees; (5), The character of decrees; and (6), The modes of compelling performance of decrees;

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##### 1<sup>o</sup> The General Nature of a Decree in Chancery.

Upon the hearing of a cause, if there be any of the defendants who have not answered, it is usual for the decree to show on its face that the proper proceedings were had, in order to mature the cause for trial as to them, *e. g.*, the due service of process upon them, proceedings by order of publication against a non-resident, &c.; but the omission

to state this in the decree, if in fact the cause has been duly matured as to all the parties, *is not error*. (Quarrier v. Carter, 4 H. & M. 242.)

But it is worthy of special observance, that all proceedings against a non-resident *alien enemy*, who cannot lawfully appear to defend his interests, are, for the most part, *inoperative and void*. A notice addressed to him, and published in a newspaper, is a mere idle form. Without a violation of law he cannot even *see*, much less *obey it*. Hence, a decree to foreclose a mortgage within the Union lines, during the late civil war, is of no effect as to the mortgagor, who had been *forced to go*, or had always been, within the Confederate lines. (Dean v. Nelson, 10 Wal. 172; Lasere v. Rochereau, 17 Wal. 438.) This principle, however, does not apply in favor of one who *voluntarily* leaves his residence to engage in hostilities against his country. Such an one cannot complain of legal proceedings prosecuted against him as an absentee. (Ludlow v. Ramsey, 11 Wal. 589.) Nor, according to the principle enforced by the Supreme court of the United States, does it apply where no judicial process is required to effect a sale, as in the case of a *deed of trust*. (University of Mo. v. Finch, 18 Wal. 168.) But the supreme court of Virginia does not admit the doctrine of this latter case, holding that when the debtor and creditor live on opposite sides of hostile lines, the debtor is *in no default* in not paying the money, and therefore, no sale can be made in pursuance of the deed. (Walker v. Beachler, 27 Grat. 516-'17.) If this principle be conceded it would expose the doctrine of Ludlow v. Ramsey also to some doubt.

The decree ought to show on its face, *upon what the cause is heard*, *e. g.*, the bill, answer, replication thereto, and exhibits, or as many of them as constituted the foundation of the decree, without, however, reciting their contents, as was formerly the practice in England; and so rigorously is this rule insisted upon, independently of statute, that where the answer denied the allegations of the bill, and a general replication thereto was filed, and depositions taken *impugning the truth of the answer*, whereupon a decree was pronounced against the defendant; yet, because in the decree, the cause was stated to have been heard upon the *bill, answer, and exhibits*, saying nothing of the replication, or of the depositions, the decree *was reversed*, as if there really had not been either replication or depositions. (Shumate v. Dunbar, 6 Munf. 431.; see Nelson v. Cornwell, 11 Grat. 741.) This seems, however, to be at all events *stricto jure*, and hardly to be reconciled with the liberal usages which distinguish proceedings in equity, and

at present is quite incompatible with the statute of *jeofails in causes in equity*, which provides, (V. C. 1873, c. 177, § 4), that "no decree shall be reversed for want of a replication to the answer, where the defendant has taken depositions as if there had been a replication; nor shall a decree be reversed at the instance of a party who has taken depositions, for an informality in the proceedings where it appears that there was a full and fair hearing upon the merits, and that substantial justice has been done." (Day v. Hale, 22 Grat, 160.)

A decree may be made in favor of *any party to the suit*, whether he is a plaintiff or defendant, whilst in a court of common law, as the student will remember, a defendant, independently of statute, can never recover anything of the plaintiff except the costs, nor anything of a co-defendant, and by statute is permitted to recover of the plaintiff in but a single case, namely, that of *set-off*. (*Ante*, p. 660, 662; V. C. 1873, c. 168, § 9.)

The exceptional practice which prevails in this particular in the court of chancery is vindicated by the consideration that, by applying to the court, the plaintiff consents to subject himself, according to the *law of the forum*, to a decree for any balance found against him. (Braxton v. Gregory, Wythe. 15; Todd v. Bowyer, 1 Munf. 447; Fitzgerald v. Jones, 1 Munf. 150; Randolph v. Kinney, 3 Rand. 398.) Hence, in equity the plaintiff is not at liberty to discontinue his suit, without the defendant's consent, any more than he can at law, under the statute of set-off, after a set-off filed. (2 Rob. Pr. (1st ed.) 405; V. C. 1873, c. 168, § 9; Lashley v. Hogg, 11 Ves. 602.)

But no decree can be made in favor of a person who is *not a party*. Hence, on a bill by one of several distributees against an executor, although the plaintiff acknowledge that the other distributees are as much entitled as himself, yet no decree for distribution amongst them can be pronounced, nor indeed any decree at all. The proper course is to *amend the bill* and make them parties. (Sheppard v. Starke, 3 Munf. 29, 40; Bailey v. Robinsons, 1 Grat. 4.) And even though persons are named as parties, it is inadmissible to decree a distribution of a fund amongst them by the indefinite description of "*brothers and sisters*" of a decedent; but the name of each, and the sum to be paid him or her must be plainly set forth; and this is true, notwithstanding the parties are joint complainants, and have been named severally in the bill. (Sheppard v. Starke, 3 Munf. 29, 40; Quarles v. Quarles, 2 Munf. 321.) So also where a husband claims in right of his wife, and also as

guardian of her infant child, the decree should discriminate between what he is to receive as guardian, and what comes to him in right of his wife. (*Cavendish v. Fleming*, 3 Munf. 198.)

2°. The Conditions to be *sometimes Named in Decrees*.

A decree may be, of course, wholly unconditional, but if it is predicated upon compliance with *any conditions*, they must be plainly set forth in it. Thus, no legacy nor distributive share is to be decreed to be paid by a personal representative, without requiring as a condition precedent, according to the statute, (V. C. 1873, c. 128, § 36,) a *refunding-bond*, to be executed by the legatee or distributee, with sufficient security, conditioned to refund "a due proportion of *any debts or demands* which may afterwards appear against the decedent, and of the costs attending their recovery;" and that although there be no appearance entered, nor defence made on the part of the personal representative. (*Sheppard v. Starke*, 3 Munf. 41; *McRae v. Brooks*, 6 Munf. 157; *Machir v. Machir*, 6 Munf. 265; *Rootes v. Webb*, 4 Munf. 77.) And in this particular consists a marked diversity in the mode of administration in equity and at law. At law there can be in no case a final judgment dependent *on a condition*; whilst equity does not scruple to impose conditions wherever the justice of the case requires them. Hence, a *judgment* for a certain sum of money, *to be discharged* by the transfer and delivery of certain stock at par, is erroneous, and must be reversed. The court can only *award damages* for the failure to deliver the stock. And hence also, there can be no proceeding *at law* for a legacy or distributive share, unless there be proved, not only *the assent* of the personal representative, but his *waiver of the refunding-bond*, which he is in general entitled to demand. (*Or. & Alex. R. R. Co. v. Cowherd*, 17 Grat. 366; *Nelson v. Cornwell*, 11 Grat. 738.)

3°. The *Terms of the Decree*.

The terms of the decree must have reference especially to the *character in which the defendant is sued*, and to the ground upon which the sentence goes against him. Hence, if money be ascertained to be due from a decedent, a decree against his personal representative, if there is no admission of assets, nor any account showing assets to be in his hands, ought to be *de bonis testatoris*; whilst if there appears to be in his hands a sufficiency of assets, whether it appear by his own admission, or by the adjustment of his accounts of administration, the decree should be *de bonis propriis*; and in either case it will be error not to have the decree according to these principles. (*Hite v. Paul*, 2 Munf. 154; *Quarles v. Quarles*, 2 Munf. 325;

Moore v. Ferguson, 2 Munf. 421; Sheppard v. Starke, 3 Munf. 29; Templeton v. Fauntleroy, 3 Rand. 434.)

In respect to decrees directing *conveyances or other writings* to be executed, it is to be observed, that the *plaintiff* may be decreed not only to execute a writing himself, but also to procure a *third person* to execute it, as the *price of the court's assistance*, (Moon v. Campbell, 6 Munf. 604); but the defendant, unless he also is a suitor to the court, cannot be required to do more than *himself* to abstain from or to perform any particular act. In order to facilitate the consummation of decrees which call for conveyances, we have in Virginia a wholesome statutory provision, that "a court in equity, in a suit in which it is proper to decree the execution of any deed or writing, may appoint a commissioner to execute the same; and the execution thereof (by such commissioner) shall be as valid to pass, release or extinguish the right, title and interest of the party on whose behalf it is executed, as if such party had been at the time capable in law of executing the same, and had executed it" (V. C. 1873, c. 174, § 7; Evans v. Spurgin, 6 Grat. 117; Howery v. Helms, 20 Grat. 7.)

A question arises in connection with decrees for conveyances of lands, whether it is competent for a court of equity to order a conveyance, or to make any other decree touching land situated in *another country or jurisdiction*. The doctrine is, that if the person to do the act decreed is within the power of the court, and the act may be done without the exercise of any authority *operating territorially* within the foreign jurisdiction, the court may act *in personam*, and oblige the party to convey, or otherwise to comply with its decree. But it is not competent to the court to decree touching a foreign subject, when the act to be done can be accomplished and perfected only by an authority *operating territorially*. Thus, a *conveyance* may be decreed of lands abroad, if the defendant is within the jurisdiction, but not a *partition of lands*, as between joint-tenants, tenants in common, or co-heirs. (2 Stor. Eq. § 1290 & seq. 1298; Penn v. Ld. Baltimore, 1 Ves. Sen. 444; Massie v. Watts, 6 Cr. 160; Dickinson v. Hoomes, 8 Grat. 411; Barger v. Buckland, 28 Grat. 863.)

Public policy so imperiously demands that an end should be made as speedily as possible of all controversy, according to the maxim, *ut sit finis litium*, that it has long been the course of the courts of equity, where all the parties liable to the plaintiff are before the court, and their several liabilities are ascertained, to decree in the first instance against the party who is ultimately responsible, or according to the rude but expressive phrase of the earlier cases,

"to put the saddle at once upon the right horse." (Garnett v. Macon, 6 Call. 349; Stor. Eq. Pl. § 172 & seq.) This doctrine of course often leads to decrees in favor of one defendant against another; but that can with propriety occur only where the equities between the defendants arise out of the pleadings and proofs between the plaintiff and the defendants, and *substantially* the decree is in favor of the plaintiff; and it is generally agreed that the practice ought not to be extended further than it has already gone. Thus where a surety files his bill against the creditor and the principal debtor, to compel the creditor to make his debt out of certain property of the principal, subject to a prior specific lien, a decree may be made accordingly, as between the two defendants. (2 Rob. Pr. (1st ed.) 397 & seq; Chamly v. Ld. Dunsany, 2 Sch. & Lefr. 689; West v. Belches, 5 Munf. 187; McNeil v. Baird, 6 Munf. 316; Cocke v. Harrison, 3 Rand. 494; Chamberlayne v. Temple, 2 Rand. 384; Morris v. Terrell, 2 Rand. 6; Templeman v. Fauntleroy, 3 Rand. 434; Kinney v. Harvey, 2 Leigh, 70; Hubbard v. Goodwin, 3 Leigh, 522; Munday v. Vawter, 3 Grat. 518; Allen v. Morgan, 8 Grat. 60; Blair v. Thompson, 11 Grat. 446 & seq; Glenn v. Clark, 21 Grat. 35; Barger v. Buckland, 28 Grat. 866.)

4°. *Reservations* contained in Decrees.

One of the most constantly recurring instances of reservations contained in decrees arises out of the well established principle, that independently of statute, a *final* decree against an infant defendant must *expressly* allow him *six months* after he comes of age to show error therein, or else it is erroneous and must be *reversed*. As to an infant *plaintiff*, it has been always considered that he is as much bound by a decree as an adult; but an infant defendant can show error therein, in pursuance of the reservation just referred to, and let it be observed, (independently of statute,) *only* in pursuance of such reservation, and hence the importance of inserting it in the decree. (Braxton v. Lee, 4 H. & M. 376; S. C. 5 Call. 459; Pickett v. Chilton, 5 Munf. 467; Brown v. Armistead, 6 Rand. 602; Jackson v. Turner, 5 Leigh, 119; Tennent v. Patton, 6 Leigh, 196.) And the only exception to this doctrine allowed in the former practice of the courts, is where lands are sold by decree of a court of chancery in order to make a partition, in which case the statute was construed to *exclude the infant defendant from having a day to show cause*. (V. C. 1873, c. 120, § 3; Parker v. McCoy, 10 Grat. 594.)

This reservation in favor of infants being very often omitted, and decrees in consequence reversed, it was in

1850 enacted in Virginia, that it should not be necessary to insert such a provision. "But in any case in which, but for this section, such provision would have been proper; the infant may, within six months after attaining the age of twenty-one years, show such cause in like manner as if the decree or order contained such provision." (V. C. 1873, c. 174, § 10.)

The cause to be shown by the infant upon attaining his age must not be merely formal without prejudice to the merits, but must show error, or fraud and collusion, (*Richmond v. Tayleur*, 1 P. Wms. 736; *Williamson v. Gordon*, 19 Ves. 115; *Pierce v. Trigg*, 10 Leigh, 429); and it must be such cause as existed at the rendition of the decree, and not such as may have arisen afterwards. (*Walker v. Page*, 21 Grat. 636.)

But other reservations may be made besides those in favor of infants. Thus, liberty may be reserved to either party to apply for *further relief*, as in order to enforce the payment of future instalments of an annuity; or in case of a decree for a legacy *quando acciderint*, that is, when assets come to the hands of the personal representative, to compel the payment of the legacy; or in case of decrees for divorce, to direct from time to time the custody of the children; and under such reservations it is competent for either party to ask the interposition of the court in a summary way, *upon motion*, or if it be preferred, the relief may be had upon a new bill to carry the former decree into effect. (*Marshall v. Thompson*, 2 Munf. 412; *Sheppard v. Starke*, 3 Munf. 29; *Jones v. Hobson*, 2 Rand. 483; *Thorntons v. Fitzhugh*, 4 Leigh, 213; *Kraker v. Shields*, 20 Grat. 403; *Ante*, p. 1138.)

#### 5°. The Character of Decrees.

It has been already explained, that the *plaintiff* in equity may set the cause for hearing as to *any defendant*, at or after the rule-day at which the bill is taken for confessed as to him, or at which his answer is filed; and in the latter case, the cause may be set for hearing on the answer, or upon a general replication thereto, as the plaintiff may prefer. And the defendant, on his side, if four months elapse after his answer is filed without the case being so set, and without exceptions being filed to his answer, may have the cause set for hearing as to himself. (V. C. 1873, c. 167, § 49.) And when the cause is thus *set for hearing* by either party, it is transferred to the *court docket*, to be disposed of in its turn, at the next ensuing term, by being heard and decided, or by being continued until the term following. (V. C. 1873, c. 173, § 2, 3.)

It seems to be the practice in England, when a cause is



thus set for hearing, for the plaintiff to give notice to the adverse party of the day appointed for the hearing. And this is done by means of a writ called a *subpoena to hear judgment*. This practice does not prevail with us, but the same purpose is subserved by the entry of the cause on the court docket. (Sands' Suit in Eq. 110; 2 Dan. Ch. Pr. 1183.)

The result of the hearing is or may be a *decree*, which is defined to be a sentence or order of the court, pronounced on hearing and understanding all the points in issue, and determining the right of all the parties to the suit, according to equity and good conscience. (2 Dan. Ch. Pr. 1192.)

It is either *interlocutory* or *final*; interlocutory, when the consideration of the particular question to be determined, or of further directions generally, is reserved till a further hearing; and final when the rights of all parties, as made by the pleadings, are completely adjudicated, and no further directions as to the *merits* of the cause are reserved, or required to be given by the court. (Dan. Ch. Pr. 1192, 1199 & notes; Young v. Skipwith, 2 Wash. 300; Allen v. Belches, 2 H. & M. 595; Alexander v. Coleman, 6 Munf. 339-'40; Thorntons v. Fitzhugh, 4 Leigh, 213; Harvey v. Branson, 1 Leigh, 108; Cocke v. Gilpin, 1 Rob. 26 & seq; Vanmeter v. Vanmeters, 3 Grat. 148; Ruff v. Starke, 3 Grat. 134; Fleming v. Bolling, 8 Grat. 292.) But whilst there is a general agreement as to the respective features of an interlocutory and a final decree, there is considerable diversity in the application of the characteristics in particular cases. (See 2 Dan. Ch. Pr. 1119, n (1); 2 Rob. Pr. (1st ed.) 421.)

In the case which we are pursuing through its proceedings, (*Ante*, p. 1110-'11,) the decree which is demanded, namely, for an account of the administration of Jane Hart, the assignment to her of her dower in her husband's lands, and the partition of the residue amongst his children and heirs, is generally allowed to be *interlocutory*. But whilst in Virginia a decree for a sale *under a mortgage* is deemed *interlocutory*, because the sale is not consummated until approved by the court, (Fairfax v. Muse, 2 H. & M. 568; Ellzey v. Lane, 2 H. & M. 558; Allen v. Belches, 2 H. & M. 595,) yet the Supreme court of the United States, and the general tenor of American authority, holds it to be *final*. (2 Dan. Ch. Pr. 1199, n (1); Ray v. Law, 3 Cr. 179; Allen v. Belches, 2 H. & M. 595; Fairfax v. Muse, 2 H. & M. 551; Cocke v. Gilpin, 1 Rob. 35 & seq.)

The form of an interlocutory decree may next be submitted as follows:

## FORM OF AN INTERLOCUTORY DECREE.

*Names of parties, &c.* James Hart, ..... Complainant,  
 vs. } In Chancery.  
 Jane Hart, in her own right, and the same Jane,  
 as administratrix with the will annexed of Thomas  
 Hart, deceased, John Hart, Henry Wells, and Mary  
 his wife, late Mary Hart, and Anne Hart, by her  
 guardian *ad litem*, ..... Defendants.

*Proceed ag't abs't defend'ts.* The defendant, John Hart, who is out of this country, and against whom the complainant appears to have proceeded in the  
*Bill taken for conf. as to him.* manner prescribed by law against absent defendants, still failing to appear and answer, on motion of the complainant, by counsel,  
*Hearing of cause as to other defend'ts.* the court doth take his bill for confessed as to that defendant. And the cause coming on to be heard this — day of —, in the year of our Lord, eighteen hundred and —, as to the other defendants,  
*Upon bill, answers, replications, exhibits and testimo'y.* upon the bill, the answers in person of the adult defendants, Jane Hart, in her own right, and also as administratrix with the will annexed of Thomas Hart, deceased, and Henry Wells, and Mary his wife, and of the infant-defendant, Anne Hart, by B. T., her guardian *ad litem*, the replications thereto, the exhibits filed, and the  
*Argument of counsel.* evidence of witnesses, was argued by counsel. On consideration whereof the court doth adjudge, order, and decree that T. W., J. C., R. F., E. K., and S. N., be appointed commissioners, who, or  
*Court's decree.* *Commissioners any three of them,* being first duly sworn, shall well and truly allot to as'gn dow'r. and assign to the defendant, Jane Hart, widow and relict of Thomas Hart, deceased, by metes and bounds, one full and equal third part, in quality and quantity, of the tract of land called Fairfield, in the bill and proceedings mentioned, whereof the said Thomas died seised of an estate of inheritance, to have and to hold the said third part for the term of her natural life, as and for the dower of the said Jane in the said land. And that the same commissioners, or any three of them, being first duly sworn, do make equal and fair partition in severalty of the residue of the said tract of land, between the complainant, James Hart, and the defendants, John Hart, Mary Wells, wife of Henry Wells, and Anne Hart, who are children and heirs of the said Thomas Hart, deceased. And the commissioners are directed to report their proceedings in pursuance of this decree to the court, in order for a final decree.  
*And to make partition.*  
*And to report.*  
*Injunction dissolved.* And the court doth further adjudge, order, and decree, that the injunction awarded in this cause by the judge in vacation *be dissolved*, and that the defendant, Jane Hart, as administratrix with the will annexed of the said Thomas Hart, deceased, do render a full, true, and perfect account of her administration of the estate of the said Thomas Hart, deceased, before one of the commissioners of this court, which account the said commissioner is directed to  
*Acc't ordered.* audit, state and settle, and make report thereof to the court, together with any matter *specially stated*, deemed pertinent by himself, or required by any of the parties to be so stated.  
*Rep't requir'd.*

This form supposes the decree to be in favor of the plaintiff, but it may of course be in favor of the defend-

dant. The substance of the decree in that case is that the *bill be dismissed*. This happens under various circumstances. Thus, where the cause comes on to be heard upon the bill and answer, without any replication thereto, if the answer unequivocally deny those allegations of the bill upon which alone it can be sustained, or if the answer set up sufficient new matter in avoidance of those allegations, in either case the bill should be dismissed. (*Ante*, p. 1192-'3, 1196; 2 Rob. Pr. (1st ed.) 312, 404.) So if the answer has been replied to, and there is but one witness against the positive denial of the answer, without any pregnant circumstances to corroborate that witness, the bill must in like manner be dismissed. (*Ante*, p. 1191; 1 Rob. Pr. (1st ed.) 404, 329; Clason v. Morris, 10 Johns. (N. Y.) 542; Thomson v. Gordon, 2 Rob. 719; Shurtz v. Johnson, 28 Grat. 665.) And again, if upon a claim founded upon contract against several, if one of them successfully impeaches the *foundation of the contract* or obligation, upon a ground common to all the parties, it enures to the benefit of all, notwithstanding the others may have allowed a decree to go against them by default, or even have in terms confessed their liability. (*Ante*, p. 787; 2 Rob. Pr. (1st ed.) 404; 1 Do. 258, 265, 387, 400; 5 Rob. Pr. 255; Clason v. Morris, 10 Johns. (N. Y.) 538; Cartigne v. Raymond, 4 Leigh, 579; Brown v. Johnson, 13 Grat. 644; Steptoe v. Read, 19 Grat. 10, 11.)

In general, when the plaintiff's case is *not proved*, either by the admissions in the answer, or by extrinsic testimony, the bill is of course to be dismissed; but if, notwithstanding the failure to make out his case, the facts proved demonstrate that in substance the plaintiff's demand is well-founded, and needs only to be presented in a somewhat different aspect, as by introducing new parties, or supplying proofs probably within his reach, the court, instead of dismissing the bill, may in its discretion allow an amendment of the bill, and postpone the hearing for that purpose, or for the purpose of introducing the additional evidence. (Allen v. Smith, 1 Leigh, 247; 2 Rob. Pr. (1st ed.) 404-'5.)

In case of an *interlocutory decree*, the court may in its discretion allow a *re-hearing*, even after the expiration of the term at which the decree is entered, the cause being still before the court. The doctrines applicable to such re-hearing will be stated in another place, *post*, p.

The interlocutory decree, of which the form has been given, requires the *special commissioners* thereby designated to allot the widow her dower, and also to make partition amongst Thomas Hart's children and heirs of the residue

of the tract of land in the bill mentioned, and further requires one of the regular *master-commissioners* of the court (of whom each chancery court has several), to audit, state and settle the accounts of administration of that decedent's administratrix with the will annexed; and these commissioners, special and regular, are directed to report their proceedings to the court with a view to a final decree. In England the practice is to issue a *formal commission* for the allotment of dower, and for the making of partition. (2 Dan. Ch. Pr. 1329, 1343); and formerly a like practice was observed in Virginia, (Rob. Forms, 41, 198); but for many years it has been customary to furnish the commissioners with a certified copy of the decree appointing them, or of an extract therefrom, if the decree contains provisions which do not concern their duty; and to that decree the commissioners annex their report, which they describe as made in pursuance thereof.

But the further exposition of the circumstances attending the performance of an interlocutory decree may be postponed to a future head. Let us consider now the form of a *final decree*, which will naturally follow upon the reports of the several commissioners, showing their doings in execution of the preliminary directions contained in the interlocutory order already described. In the particular case under consideration, we may suppose that the special commissioners report that, having been duly sworn, they have allotted the widow her dower by metes and bounds, which they set forth; and also that they have divided the residue of the land amongst the children and heirs of the decedent, assigning to each one by lot his several part, by metes and bounds. And that the *master-commissioner* reports that, after giving due notice to the parties concerned, he proceeded to audit, state and settle the administration-accounts of Jane Hart upon her husband's estate, and found her indebted to the estate in a large sum of money, which is designated; that the debts of the estate had all been paid save one for a considerable sum contingently due to one H. C., for the payment of which, in the contingency contemplated, a proper proportion of the balance due from the administratrix must be reserved, subject to the future disposition of the court; that the remainder in the hands of the administratrix, may be distributed amongst the distributees of the decedent, Thomas Hart, in the proportion of one-third or four-twelfths to the widow, the defendant, Jane Hart; two-twelfths each to James Hart, the complainant, and John Hart, Henry Wells, in right of his wife Mary, and Anne Hart, the defendants; and that the four blooded mares specifically bequeathed by Thomas

Hart to the complainant James, over and above his proper and equal share of the testator's estate, are not needed for the payment of debts, and may be safely delivered to the said legatee. The final decree upon this basis, would be as follows:

## FORM OF FINAL DECREE.

*Names of parties, &c.* James Hart, ..... Complainant,  
vs. } In Chancery.

Jane Hart, in her own right, and the same Jane, as administratrix with the will annexed of Thomas Hart, deceased, John Hart, Henry Wells, and Mary his wife, late Mary Hart, and Anne Hart, an infant, under the age of twenty-one years, by B. T., her guardian *ad litem*, assigned to defend her in this suit, .... Defendants.

*Hearing of cause.* This cause comes on this — day of —, in the year of our Lord, eighteen hundred and —, to be finally heard upon the

*Upon papers form'ly read, and reports of commissioners* papers formerly read, the report of T. W., J. C., R. F., and S. N., four of the commissioners appointed to allot to the defendant, Jane Hart, her dower in the lands of her late husband, Thomas Hart, deceased, and to make partition of the residue of said lands to allot dow'r, in severalty, amongst the children and heirs of the said Thomas, and the report of master commissioner, M. G., of his settlement of

*Also of master commissioner.* the administration account of the said Jane Hart, as administratrix with the will annexed of the said Thomas Hart, deceased, to none of which reports is there any exception,—and was argued by counsel. On consideration whereof, it appearing to the court that, in

*Recital of partition.* the partition made by the said commissioners to and amongst the said children and heirs of the said Thomas, of the lands in the bill and proceedings mentioned, lot number (1), embracing, &c. [*here describe it*], fell to the share of John Hart; lot number (2), embracing, &c. [*here describe it*], fell to the share of Anne Hart; lot number (3), embracing, &c. [*here describe it*], fell to the share of Mary, wife of Henry Wells; and lot number (4), embracing, &c. [*here describe it*], fell to the share of James Hart; and it also ap-

*And of allotment of dow'r.* appearing to the court that by the allotment of the same commissioners dower was assigned to the said Jane Hart, in the lands whereof

*Approval of reports.* her said husband was seised of an estate of inheritance, during the coverture between them, according to the metes and bounds following, namely, &c. [*here set forth the boundaries*], the court doth approve and confirm the said reports, and doth adjudge, order, and

*Decree of court as to dower.* decree that the said Jane Hart shall be seised for and during the term of her natural life of the land so allotted to her as aforesaid, as and for her dower in her said husband's estate, by the commissioners

*As to partition.* aforesaid, according to the metes and bounds in the said report designated. And the court doth further adjudge, order, and decree that mutual conveyances with special warranty be executed by the said James Hart, John Hart, Mary Wells, and Anne Hart, to each other, (the conveyance of the said Mary Wells, who is a *feme covert*, and in behalf of the said Anne Hart, who is an infant under the age of twenty-one years, to be executed by Henry Wells, the husband of the said Mary, which said Henry is hereby appointed a

commissioner for that purpose), of the several lots or portions of land hereinbefore mentioned, assigned, and allotted to each of them as aforesaid.

*Retainer by administrat'z of a fund.* And the court doth further adjudge, order and decree, that the said Jane Hart do retain in her hands, subject to the future order of the court, the sum of ——— dollars, being the amount required to discharge the demand which may be payable from the estate of the said Thomas Hart, deceased, to H. C., upon the contingency

*Distribution of residus.*

set forth in the report of master-commissioner, M. G., and do pay to the several distributees of the said Thomas Hart, deceased, their respective proportions of the residue of the sum ascertained by the report of master-commissioner, M. G., to remain of the assets of the said Thomas' estate, in the hands of the said Jane, to be administered, that is to say, to the complainant, James Hart, ——— dollars, being two-twelfths of the same, with interest after the rate of six per centum per annum, on ——— dollars, part thereof from the ——— day of ———, in the year of our Lord, eighteen hundred and ———, until paid; to John Hart, the same sum, with like interest on the same sum, from the same time, until paid; to Henry Wells, in right of his wife Mary, the same sum, with interest on the same sum, from the same time, until paid; to Anne Hart, by her guardian, lawfully appointed and constituted to receive the same, the same sum, with interest on the same sum, from the same time, until paid; and to herself, the said Jane, ——— dollars, being four-twelfths of the said distributable surplus in her hands as aforesaid, with interest after the rate aforesaid, on ——— dollars, part thereof, from the ——— day of ———, in the year of our Lord, eighteen hundred and ———, until paid. And the court doth further adjudge, order and decree, that the said Jane do forthwith deliver to the said James Hart, the complainant, the four blooded mares specifically bequeathed to him by the said Thomas Hart's will.

*Reservation touching re-funding bonds.*

But the effect of this decree, as to the payments to be made by the said Jane Hart, of the distributive shares aforesaid, to the children and distributees of the said Thomas Hart, deceased, and as to the delivery to the said James Hart, of the specific bequest of the blooded mares aforesaid, is to be suspended until the several parties, to whom such payments and such delivery are to be made, or some one for them, shall respectively execute, according to law, *refunding bonds*, in sufficient penalties, and conditioned as the law directs.

*Reservation of leave to apply for further distribution.*

And leave is reserved to the said complainant, James Hart, and to either of the defendants, children and distributees of Thomas Hart, deceased, to apply to the court at any time hereafter, for further directions touching the said sum of ——— dollars, reserved in the hands of the said Jane, as herein before mentioned, in order to satisfy the contingent demand of the said H. C.

*Touching costs. Reservation in favor of infant defendant.*

And the court doth further adjudge, order and decree, that the costs of this suit shall be paid by the parties thereto in equal proportions. And leave is reserved to the infant defendant, Anne Hart, at any time within six months after she shall attain her age, to show cause against this decree.

The assignment of dower and partition thus decreed, or any recovery of land by judgment or decree, constituting as it does a link in the subsequent chain of title to the land, or at least a matter which affects the title, ought of course to be registered; and accordingly it is enacted, that "the clerk of the court wherein there is any partition of, or assignment of dower in, land under any order, or any recovery of land under judgment or decree, shall transmit to the clerk of the court of each county or corporation wherein such land is, a copy of such order, judgment or decree, and of such partition or assignment, and of the order confirming the same, and along therewith such description of the land as may appear in the papers of the cause. And the clerk of the court of such county or corporation shall record the same in his deed-book, and index it in the name of the person who had the land before, and also in the name of the person who became entitled under such partition, assignment or recovery." (V. C. 1873, c. 159, § 15.)

6°. Modes of *Compelling Performance* of a Decree in Chancery.

Decrees in chancery, in respect to *compelling their performance*, may be distinguished into, (1), Decrees to pay money, or to deliver property; and (2), Decrees to do some collateral thing other than to deliver property. It will be expedient, however, to invert the order of the topics, and to expound the last in the first place;

W. C.

1°. Decrees to do some *Collateral thing*, other than to deliver Property.

The mode of compelling performance of decrees to do some collateral thing, other than to deliver property, as to execute a conveyance, to cancel a writing, &c., still is as at common law it was in respect to *all decrees, by process of contempt*. Process of contempt, which is applicable also to compel a defendant to *answer the bill*, is by, (1), An attachment, followed if need be by (2), An attachment with proclamations; and that by (3), A commission of rebellion, accompanied by an order of arrest; and finally by (4), A writ of sequestration. (Sands' Suit in Eq. § 82 & seq; Rob. Forms, 207 & seq; 2 Rob. Pr. (1st ed.) 411; Hook v. Ross, 1 H. & M. 310);

W. C.

1°. An *Attachment*.

The attachment, which must be preceded by a rule to show cause against it, is a writ in the name of the commonwealth, addressed to the sheriff or sergeant, to *attach* (that is, to *seize*) the defendant's body, and have it before

the court on a day named, to answer as well for a certain contempt offered to the court by disregarding its decree, as for whatever may be then objected to him; and further to do and receive what the court shall in that part consider. (Rob. Forms, 207, 187, 39; Sands' Suit in Eq. 414; Hook v. Ross, 1 H. & M. 310; Taliaferro v. Horde, 1 Rand. 242; Birchett v. Bolling, 5 Munf. 442.)

2<sup>d</sup>. An Attachment *with Proclamations*.

Upon the return of the attachment *non est inventus*, the attachment *with proclamations* issues. It is a writ addressed to the sheriff or sergeant commanding him in the name of the commonwealth to cause it to be *publicly proclaimed* in his bailiwick, that the defendant, *under penalty of his allegiance*, shall personally appear at the return-day of the process, and if meanwhile he can find the defendant, *to attach him*, so as to have his body before the judge of the court at the return-day, to answer as well for his contempt as for those things which shall then and there be objected to him; and further to do and receive what the court shall in that part consider. (Rob. Forms, 208; Sands' Suit in Eq. 414; 2 Rob. Pr. (1st ed.) 411; Lane v. Lane, 4 H. & M. 437.)

3<sup>d</sup>. A *Commission of Rebellion*, accompanied by an *Order of Arrest*.

Supposing the attachment with proclamations to be also returned *non est inventus*, a commission of rebellion is awarded, accompanied by an order of arrest. The commission of rebellion is in the name of the commonwealth, and addressed to the sheriff or sergeant. It recites that whereas, by public proclamation, the defendant has been commanded *upon his allegiance* to appear, and yet has contemned the command, the officer is therefore required *to attach him*, wherever found in the commonwealth, as a rebel and contemner of the laws, so as to have his body before the court on a day named in the next term, to answer as well touching the contempt as such other matters as shall be objected against him, and further to abide and perform such order as the court shall make; and *all officers* and citizens of the commonwealth are commanded *to aid in the execution of the writ*. (Rob. Forms, 208, 43; Purcell v. Purcell, 4 H. & M. 519; Sands' Suit in Eq. 415.)

4<sup>d</sup>. A Writ of *Sequestration*.

The writ of sequestration is also in the name of the commonwealth, and is addressed to certain commissioners designated by name, and reciting the decree, and that the *previous process of contempt* has proved futile,



commands them *to enter upon and take possession of all the delinquent's estate*, real and personal, and *sequester the rents and profits*, and to keep the same subject to the future order of the court; and to make return of the writ, showing what has been done under it. (Rob. Forms, p. 44, 208-'9; Sands' Suit in Eq. 416; 2 Rob. Pr. (1st ed.) 411-'12; Hook v. Ross, 1 H. & M. 310; Ross v. Colville, 3 Call. 382.)

2<sup>f</sup>. Decrees to Pay Money, or to Deliver Property.

At common law decrees to pay money, or to deliver property, real or personal, are enforced like decrees to do some collateral thing; but by statute in Virginia a decree for land, or for specific personal property, or for the payment of money, may be enforced *like a judgment at law*, by execution. (V. C. 1873, c. 183, § 21, &c.; Id. c. 182, § 1, &c.; *Ante*, p. 797 & seq.)

SECTION V.

*The Circumstances Attending the Carrying out of a Decree.*

5<sup>d</sup>. The Circumstances attending the Carrying out of a Decree.

The circumstances attending the carrying out of a decree, if fully detailed, would occupy too much space. The present exposition must be limited to, (1), The case of partition of land, and assignment of dower; and (2), The case of the settlement of accounts;

W. C.

1<sup>e</sup>. The Circumstances attending the Carrying out of a decree for *Partition*, for the *Assignment of Dower*, &c.

The court of chancery has long exercised a jurisdiction to decree *partition of estates*; at first in consequence of some difficulty in proceeding at law, as where the tenants in possession are seised of particular estates only; for the persons entitled in remainder are not bound by the judgment of a law-court in a writ of partition. But for more than a century past equity has paid no regard to any complication of titles, but has in all cases entertained a bill for partition, provided only the plaintiff has a *clear legal title*. (Mitf. Eq. Pl. 109-'10; Coop. Eq. Pl. 135; 1 Stor. Eq. § 650 & seq; 2 Rob. Pr. (1st ed.) 10 & seq; Wisely v. Findlay, 3 Rand. 361; Castleman v. Veitch, 3 Rand. 598; Stuart v. Coalter, 4 Rand. 74; Straughan v. Wright, 4 Rand. 495.) In Virginia, not only is the jurisdiction of equity in respect to partitions confirmed, but in the exercise thereof the courts of equity are empowered to take cognizance of all questions of law affecting the legal title that may arise in the proceeding. (V. C. 1873, c. 120, § 1.) Very judi-

cious provisions are also enacted tending to facilitate the actual making of the partition. Thus, if the name or share of any person interested in the subject of the partition be unknown, so much as is known in relation thereto shall be stated in the bill, and the persons unknown may be made defendants by the general description of *parties unknown*; and on affidavit of the fact that the names are unknown, an *order of publication* may be entered against them as against non-residents. (V. C. 1873, c. 120, § 4; Id. c. 166, § 10.) Any two or more of the parties may have their shares, if they so elect, laid off together, when partition can be conveniently made in that way. (V. C. 1873, c. 120, § 2.) And whilst, if it may be so without inconvenience, the shares should be allotted in severalty, as at common law was indispensable in all cases, (2 Insts. Com. & Stat. Law, 421 & seq; 2 Dan. Ch. Pr. 1334 & seq); yet when that mode of partition is not conveniently practicable, the court is clothed with ample power to resort to the most advantageous devices which the nature of the case may admit, as to allot the whole to any of the parties who will take it, and pay in money their respective shares to the others; to sell the whole subject and divide the proceeds; to sell a part and divide the rest; and all this may be done notwithstanding the coverture, infancy or insanity of any of the parties, only observing that, in making an order for a sale, when the dividend of a party exceeds the value of \$300, if such party be an infant or insane person, the court shall require security for the faithful application of the proceeds of his interest, in like manner as if the sale were made at the instance of the party's guardian, or committee, under V. C. 1873, c. 124, § 2 & seq. (V. C. 1873, c. 120, § 3; Cox v. McMullin, 14 Grat. 91.)

It is a maxim that partition does not affect the interests of third persons. Mortgagees and judgment creditors have no concern with it, and when they are made parties to the suit only in that character, the bill will be dismissed as to them. (2 Rob. Pr. (1st ed.) 14; Agar v. Fairfax, 17 Ves. 544; Wotton v. Copeland, 7 Johns. Ch. R. (N. Y.) 140; Sebring v. Mersereaw, 1 Hopk. Ch. R. (N. Y.) 501.) But where the incumbrance is created upon the undivided share of one of the parties, it will continue a lien upon his share when set-off to him in severalty. (Harwood v. Kirby, 1 Pai. (N. Y.) 471.) And so it is provided with us by statute, that any person who before the partition or sale was lessee of the lands divided or sold, shall hold the same of him to whom the land is allotted or sold, on the same terms on which by his lease he held it before the partition. (V. C. 1873, c. 120, § 5.)

A bill in equity was always maintainable for the partition of personal property, (for which in the common law courts no proceeding could be had,) and now by statute, it is enacted that when an equal division cannot be made, the court may direct the sale of the property and the division of the proceeds. (*Smith v. Smith*, 4 Rand. 95; V. C. 1873, c. 120, § 6.)

The partition is made, as we have seen, by *commissioners*, who in England act as a court, sitting openly, examining witnesses, causing surveys to be made, being attended by the parties or their solicitors, &c. (2 Dan. Ch. Pr. 1330 & seq.) In Virginia, the proceeding is much less formal. The commissioners may perhaps have power to examine witnesses, but it is believed not to be usual so to do. They have power, however, and exercise it upon occasion, to have the land surveyed, for which purpose they may be attended by the county-surveyor, by whom also the required dividing lines are to be run, under the direction of the commissioners. (Rob. Forms, 48.)

The number of commissioners appointed is usually five, with power to any three of them to act. They are directed to be sworn before acting, and their report to the court should show that they were so sworn. Their report must, of course, be in writing, and ought to describe the partition which they have made, by metes and bounds, with precision.

As the commissioners are usually named by the parties, though appointed by the court, the principles which apply to arbitrators are in a degree applicable to them. But when it can be shown that they have committed a gross error, (although there is no proof of partiality or corruption,) an exception to their report will for that reason be sustained, and the report be set aside. (2 Dan. Ch. Pr. 1334.)

The allotment of their respective shares to the parties entitled, after a division as equal as possible has been made, may be determined directly by the commissioners; or they may resort to *the lot*, which latter is usually preferred. (2 Insts. Com. & Stat. Law, 423; 2 Dan. Ch. Pr. 1336.)

Upon the return of the commissioners' report of the partition, if no successful objection is made thereto, the final decree confirms the report; or if a sale be found necessary, orders it to be made, in which latter case the decree is not entirely final, the cause being reserved in order that the court may superintend the sale. Supposing an allotment of shares to the several tenants to have been made and confirmed, the decree directs *mutual conveyances*

to be executed by the parties to each other of the several lots assigned to them respectively, for the decree itself confers only an *equitable title*. See upon this subject 2 Insts. Com. & Stat. Law, 424; V. C. 1873, c. 174, § 7, 10; 1 Stor. Eq. § 651-2; Whaley v. Dawson, 2 Sch. & Lefr. 471-2; Jackson v. Turner, 5 Leigh, 119; Tennent v. Patton, 6 Do. 196; Custis v. Snead, 12 Grat. 260; Cox v. McMullin, 14 Grat. 82; Howery v. Helms, 20 Grat. 1; Frazier v. Frazier, 26 Grat. 500; Zirkle v. McCue, 26 Grat. 517; Wilson v. Smith, 22 Grat. 493.)

The assignment of dower has also long been regarded as a proper subject of equity-cognizance, at first by reason of the embarrassments which often obstructed the assertion of a widow's rights in a court of law; but for more than a century, without pretending such obstruction, in *all cases*—at least where the legal title to dower is not in controversy. (2 Insts. Com. & Stat. Law, 139-'40; 1 Stor. Eq. § 624 & seq.; 2 Rob. Pr. (1st ed.) 5, 6, 10; Herbert v. Wren, 7 Cr. 370; Mundy v. Mundy, 2 Ves. Jr., 122, 128, 129, and *notes*); and this jurisdiction is, in Virginia, confirmed by statute. (V. C. 1873, c. 106, § 10.)

The assignment of dower, like partition, is made by commissioners, in pursuance of the same general principles as above stated. See 2 Insts. Com. & Stat. Law, 140-'41; Braxton v. Coleman, 5 Call. 433; Heth v. Cocke, 1 Rand. 354; Tod v. Baylor, 4 Leigh, 498; White v. White, 16 Grat. 264; DeVaughn v. DeVaughn, 19 Grat. 556; Simmons v. Lyles, 27 Grat. 922.

## 2°. The Circumstances Attending the Carrying out of a *Decree for the Settlement of Accounts*.

Under this head it is proposed to explain (1), The origin of the equitable jurisdiction in matters of account; (2), The various instances where matters of account are cognizable in equity; (3), The circumstances which warrant a decree for an account; and (4), The proceedings of a master-commissioner in the settlement of accounts;

W. C.

### 1°. The Origin of the *Equitable Jurisdiction in Matters of Account*.

The common law affords, in order to compel the settlement of accounts, and to ascertain the balance due, no other remedy than the ancient action of account, or *acompt*, as it is more accurately styled in the older books. But notwithstanding the aids from time to time derived from statutory provisions, the proceedings in that action were found so dilatory, inconvenient, and unsatisfactory, that for ages past the courts of equity have assumed and exercised jurisdiction to adjust matters of account, not

only in all cases where the action of account is available, but by parity of reason (that is, in consequence of the *inadequacy of the existing legal remedy*), in others also to which the action of account was never applicable. The jurisdiction of equity, therefore, now extends, not only to cases of an equitable nature, but to many cases where the items constituting the demand are of a character purely legal, and such as are often, although under great disadvantages, the subject of actions at law, other than the action of account, such as debt, covenant, and trespass on the case in assumpsit. (1 Stor. Eq. § 442.)

Some account of this gradual encroachment of equity upon the original domain of the courts of law, if not necessary, will be at all events appropriate. The first step was to assume cognizance of all the cases to which the action of account applies. Let us see what these are, either at common law or by statute.

The action of account, at common law, is adapted to those cases only where there is a trust, or *privity in deed*, by the consent of the party, as in the case of a bailiff or receiver appointed by the plaintiff; or a *privity in law*, *ex provisione legis*, as in the case of a guardian in socage. An extension of the doctrine is allowed for the benefit of trade, in favor of and between merchants, where one may be regarded as the *receiver* for and in behalf of the other. But the action is strictly confined, at common law, to bailiffs, receivers, guardians in socage, and merchants, where they may be charged by virtue of consignments made by other merchants to them *as receivers* for the latter. And so strictly is this notion of *privity of contract* insisted on, that the action does not lie at common law against or by *executors or administrators*. (1 Stor. Eq. § 445; *Coltam v. Partridge*, 4 Man. & Gr. (43 E. C. L.) 284-'5; *Bac. Abr. Accompt*, (A); 3 Th. Co. Lit. 346-'7, n (15), (16), (P); 3 Rob. Pr. (2nd ed.) 410.) The statute 13 Edw. I, c. 23, gave it to *executors*; that of 25 Edw. III, c. 5, to *executors of executors*; and that of 25 Edw. III, c. 11, to *administrators*. But it was not until 3 & 4 Anne, c. 16, that it lay *against executors and administrators* of guardians, bailiffs, and receivers, and *by and against joint-tenants and tenants in common*, and their personal representatives, even though such joint-tenants and tenants in common were *not appointed receivers*. (*Bac. Abr. Accompt*, (A); 1 Th. Co. Lit. 340, n (10), (11), & (12); *Id.* 787, & n (R).)

We have, in Virginia, corresponding legislation, (V. C. 1873, c. 145, § 14), as to joint-tenants, and tenants in common, and their personal representatives, and also

allowing the action of account *against* executors and administrators of guardians, bailiffs, and receivers; but not *in favor* of such executors and administrators, unless it be included (as seems probable), in the reservation of all writs, *remedial and judicial*, given by any act of parliament not local to England prior to 4 Jac. I. (See 2 Lom. Ex. 588.) Or unless it be included in the general provision touching suits by or against personal representatives. (V. C. 1873, c. 126, § 19, 20.)

In an action of account there are two judgments. The first, or *interlocutory* judgment, is *quod computet*—that the defendant do account, and afterwards, when the settlement of the account is completed, the second or *final* judgment is *quod recuperet*, that the plaintiff recover against the defendant the amount in which the latter is found in arrear. The first judgment, *quod computet*, may be the result (as in the very instructive case of Godfrey v. Saunders, 8 Wils. 94, 98 it was), of the verdict of a jury passing upon issues joined, denying the obligation to account; and thereupon the court appoints auditors, usually two of the officers of the court, who are armed with authority to convene the parties before them *de die in diem*, at any day or place that they shall appoint, till the account is determined. A judgment *quod computet* does not conclude the defendant as to the dates or sums mentioned in the declaration; but the auditors may make the proper charges and credits without regard to the verdict, which, for the most part, determines nothing but the *obligation to account*. If the matters offered before the auditors are controverted by the plaintiff he may demur, or take issue in point of fact; and this demurrer or issue in fact is certified by the auditors to the court, where the matter of law is decided by the court, and of fact by a jury; which being returned to the auditors, they adjust and report an account accordingly; but as these references may be repeated in connection with each item of the account, the proceeding is liable to become intolerably tedious, expensive, and inconvenient, especially as besides the contested matters of law or fact which there may be occasion to submit to the court or to a jury, either of the parties, if he thinks the auditors do him injustice, may apply for redress to the court. (Bac. Abr. Accompt. (F); 1 Stor. Eq § 447, 448.)

This brief sketch of the mode of proceeding in an action of account, suffices to show how unfit a medium it is to ascertain and adjust the real merits of long, complicated and mutual accounts. The student will observe that, in the *first place*, it is wholly inapplicable to a vast

variety of cases of *equitable claims*, of constructive trusts, of fraudulent contrivances, and of tortious misconduct, and even of mutual accounts between ordinary parties, where there is *no privity*, by virtue of a receivership or otherwise, and yet from the complication of the transactions, an adequate remedy before a jury, in a court of law is impracticable; and in the *second place*, there is at common law, (it is otherwise in Virginia, by statute,—V. C. 1873, c. 172, § 44, 45,) a want of needful power in a law-court to draw out upon occasion a discovery from the adversary, or to compel the production of documents in his possession, so that if evidence *aliunde* is unattainable, there is, and can be no effective redress. (3 Bl. Com. 164; 1 Stor. Eq. § 449.)

On the other hand, the facility of proceeding in the courts of equity stands in striking contrast with the obstructions which impede the legal remedy. In exercising its cognizance over accounts, the court of equity proceeds in many respects in analogy to what is done at law. The cause having been so far matured as to demonstrate that an account is proper, an interlocutory decree is rendered, referring it to one of the master-commissioners of the court, (acting as *sole auditor*,) to examine, state and settle the account between the parties. Before him the account is taken, and he is armed with the fullest powers, not only to examine the parties on oath, but to make, by means of the testimony of witnesses under oath, and by documents, books and vouchers which he may compel the parties to produce, all the inquiries which are needful for the due administration of justice. And when his report is made to the court, any objections urged before him, and any exceptions by either party to his statements and conclusions may be re-examined, and upon argument, adjudged by the court, and the whole case moulded and directed as *ex æquo et bono* may be required. The court may also bring all proper parties in interest before it, where there are different parties concerned in interest; and if any serious doubt arises upon any particular demand as to which there is a conflict of testimony, it may direct the same to be *submitted to a jury*, upon an issue made up for the purpose. (1 Stor. Eq. § 450; 2 Dan. Ch. Pr. 987, 1285 & seq; Pleasants v. Ross, 1 Wash. 156; Pryor v. Adams, 1 Call. 382; Stanard v. Graves, 2 Call. 369; Hooe v. Marquess, 4 Call. 422; Marshall v. Thompson, 2 Munf. 412; Bullock v. Gordon, 4 Munf. 450; Galt v. Carter, 6 Munf. 245; Brent v. Dold, Gilm. 211; Knibb v. Dixon, 1 Rand. 249; Douglas v. McChesney, 2 Rand. 109; Grigsby v. Weaver, 5

Leigh, 197; Isler v. Grove, 8 Grat. 257; Mettert v. Hagan, 18 Grat. 231; Beverly v. Walden, 20 Grat. 147; Magill v. Manson, 20 Grat. 527.)

2<sup>d</sup>. Various Instances where *Matters of Account are Cognizable in Equity*.

From what has been said it appears that in all cases where the intervention of the court of equity is needful to give *full and adequate redress* in matters of account, notwithstanding in its nature the demand may be of a purely legal character, and such as comes clearly and most naturally within the cognizance of the law-courts, the equitable jurisdiction is well established, although it is sometimes questioned, and its limits may not be always accurately defined. These cases may be thus enumerated:

(1), Wherever the matter of account stands upon *equitable claims*, or has *equitable trusts* attached to it. (1 Stor. Eq. § 454);

(2), In all cases of the *administration of the personal assets of a decedent*, and consequently of what concerns the debts, legacies, distribution of the residue, and the official conduct of executors and administrators, which, without violence, may be referred to the preceding head of *equitable trusts and claims*. (1 Stor. Eq. § 453; 3 Bl. Com. 437);

(3), Dealings *in partnership*, and many other mercantile or business transactions. (1 Stor. Eq. § 453; 3 Bl. Com. 437);

(4), Wherever the liability is that of *bailiff, receiver, factor or agent* to his principal. (3 Bl. Com. 437; 1 Stor. Eq. § 453; Berkshire v. Coons, 4 Leigh, 223);

(5), Wherever *co-parceners, joint-tenants, or tenants in common* are called to account for rents, profits, &c., *over and above their respective shares*. (Ruffners v. Lewis, 7 Leigh, 721; Graham v. Pence, 19 Grat. 38);

(6), Wherever in matters of accounts growing out of *privity of contract*, there are *mutual demands*, and *a fortiori* when the accounts are *intricate*. (2 Stor. Eq. § 459; Hunter v. Spotswood, 1 Wash, 146; Smith v. Marks, 2 Rand. 449; Hickman v. Stout, 2 Leigh, 6); and

(7), Where the accounts are all on one side, but a *discovery is sought, and is material to the relief*. (1 Stor. Eq. § 459; Lyons v. Miller, 9 Grat. 427; Sturtevant v. Goode, 5 Leigh, 83.)

And on the other hand, where the accounts are all on one side, and no discovery is sought or needed; and also where there is a single matter of demand on the side of the plaintiff seeking relief, and mere payments on the other side, and no discovery is sought or needed; in all



such cases a court of equity declines to take cognizance of the cause, no peculiar remedial process or function of that court being called for by the exigency of the case. (1 Stor. Eq. § 459-'60; *Smith v. Marks*, 2 Rand. 449; *Poague v. Wilson*, 2 Leigh, 490; *Bassett v. Cunningham*, 7 Leigh, 402.)

3<sup>d</sup>. The Circumstances which warrant a Decree for an Account.

An order or decree for an account is not to be made merely because it is asked for. The cause must be so far developed by the pleadings and proofs as to demonstrate the propriety of an account, and the extent to which it should go. If an account were decreed whenever there seemed *prima facie* a probability that one would be ultimately ordered, although time might thereby be sometimes gained, yet it would be occasionally at great expense and trouble to parties, who, in the end, might appear to be under no obligation to render an account. (2 Dan. Ch. Pr. 997; *Allen v. Smith*, 1 Leigh, 252; *Corbin v. Mills*, 19 Grat. 465.)

So, upon like principles, an account will not be directed beyond what the pleadings and proofs in the cause justify, (*Censequa v. Fanning*, 3 Johns. Ch. R. (N. Y.) 595); although such an order (as in case of a creditor's bill to administer a decedent's assets, &c.) may sometimes involve persons *not yet parties to the suit*; e. g., creditors who have not signified their desire to join in the bill. (*Kinney v. Harvey*, 2 Leigh, 70.) Nor is it needful that the facts upon which the *items* of the account depend should be developed in evidence. (2 Dan. Ch. Pr. 997-998.)

The agency employed by the court of chancery to adjust and settle accounts, as also to make other complex inquiries, is that of a *master commissioner*. Of these officers, each chancery court is allowed in Virginia to appoint a *number not exceeding in most cases four*, but in Richmond seven, and in a few counties five, who are removable at the pleasure of the court, (V. C. 1873, c. 171, § 2, &c.; Acts 1875-'6, p. 7, c. 6), and are allowed for their services, in general, not exceeding *seventy-five cents* an hour. (V. C. 1873, c. 180, § 5.)

The order or decree referring accounts to a commissioner for settlement (which is always *interlocutory*), directs the particular accounts called for by the pleadings to be audited, stated, and settled, and reported to the court, together with *any matters specially stated which the commissioner shall deem pertinent, or either party may require to be so stated*, (2 Rob. Pr. (1st ed.) 361); which, indeed is by statute made the duty of the commissioner,

even though it be not so set down in the decree. (V. C. 1873, c. 128, § 26.) The court may also direct the commissioner to examine the parties upon oath; and to disclosures so made or demanded, the same principles apply touching their effect, as to an answer. (*Hart v. TenEyck*, 2 Johns. Ch. R. (N. Y.) 503; *Calloway v. Tate*, 1 H. & M. 9.)

Such an order or decree is usually made in term-time; but in the circuit courts the judge, in vacation, may direct an account; may substitute one commissioner for another, and may refer the cause to a special commissioner, appointed for the occasion. (V. C. 1873, c. 171, § 6.)

4<sup>t</sup>. *The Proceedings before a Master Commissioner, to Settle an Account.*

The discussion of the proceedings before a master-commissioner will require us to advert to (1), The notice to the parties of the commencement of the proceedings, and the adjournment from time to time; (2), The taking of testimony by the commissioner, and reference by him to the court or judge; (3), The report by the commissioner of his doings in pursuance of the decree; (4), The classes of persons as to whom orders of account are the most frequent; and (5), The modes of settling accounts, especially of executors and administrators; W. C.

1<sup>st</sup>. *The Notice by the Commissioner to the Parties, of the Commencement of his proceedings, and the Adjournment thereof from Time to Time.*

It will readily be supposed that, before the commissioner proceeds to take an account, he ought to give notice to all the parties concerned, in order that they may attend him with the necessary materials, and have an opportunity of presenting their views. If, however, notice be not given, that objection must be raised by the party complaining of it. The court will not, *ex-officio*, advert to it, nor can it be first urged in an appellate court. (2 Rob. Pr. (1st ed.) 362; *White v. Johnson*, 2 Munf. 305; *Winston v. Johnson*, 2 Munf. 205; *McCandlish v. Edloe*, 3 Grat. 315.)

The notice, if the parties be resident in the state, is, for the most part, to be given them *in person*, the mode of serving it being prescribed by statute, (V. C. 1873, c. 163, § 1); nor formerly, as is believed, could it be given otherwise, however numerous and dispersed the parties; but it is now judiciously provided, (V. C. 1273, c. 171, § 5), that "the court ordering an account to be taken, may direct that notice of the time and place of taking it be published once a week for four successive weeks, in some convenient newspaper, and that such publication shall be

equivalent to personal service of such notice on the parties, or any of them." (McCandlish v. Edloe, 3 Grat. 333; Hill v. Bowyer, 19 Grat. 380.) Where the parties are non-residents of the state it has long ago been enacted that the notice may be served as to them "by the publication thereof once a week, for four successive weeks, in a newspaper printed in the state." (V. C. 1873, c. 163, § 2.)

The commissioner is specially empowered to adjourn his proceedings from time to time without any new notice, until his report is completed, and such adjournments will be presumed to be proper unless the contrary appears, (Fant v. Miller, 17 Grat. 187; Hill v. Bowyer, 18 Grat. 364); and when the account is completed, it is not required, as formerly, to be retained by him for ten days, but may be filed in the clerk's office at any time thereafter. (V. C. 1873, c. 171, § 8, 9.)

2<sup>nd</sup>. *The taking of Testimony by the Commissioner, and Reference by Him to the Court or Circuit Judge.*

If it be needful, testimony may be taken before the commissioner touching the inquiry on which he is engaged. (Parkinson v. Ingram, 3 Ves. 603, 608 & notes.) Such testimony is taken usually, and it would seem more properly, in the form of *depositions*, subscribed by the witnesses, (Matth. Comm'rs 61 & seq); and for the purpose of procuring it, he is armed with power to issue a summons for any witness, and if he fails to attend, to fine him, and by attachment compel him to attend and give evidence, but as to the fine, with an appeal to the court. (V. C. 1873, c. 172, § 26, 28 & seq.) And of course the commissioner has before him all the general testimony in the cause, documentary and oral, (in the form of depositions), whether it were in the cause when the order for an account was made, or has been introduced since.

When in the course of his investigations, a commissioner doubts as to any point which arises before him, in taking an account to be returned to a *circuit court*, he may in writing submit the point to such court, or *the judge thereof*, who may instruct him thereon. (V. C. 1873, c. 171, § 7.) If the report is to be made to a *corporation court*, the application for instructions ought to be addressed, it is believed, *to the court in term*.

3<sup>rd</sup>. *The Report by the Commissioner of his Doings in pursuance of the Decree.*

We have seen that, when the commissioner has completed his report, he may file it in the clerk's office *at any time* thereafter, and it is doubtless his duty to file it

with promptness. He is required to return with his report, the decrees or orders and notices under which he acted. He is not to copy in his account or report any paper; and if there has been a previous account, he is not to copy it into his; but taking it as the basis of his, he is to correct the errors and supply the defects thereof by an additional statement. Every thing improperly copied is to be expunged at his costs, on the application of either party; and if on account of his negligence or misconduct a report be re-committed, he shall bear the costs occasioned thereby. (V. C. 1873, c. 171, § 9.)

A cause may be heard upon the commissioner's report after it has been returned *ten days*, (formerly the time was *thirty days*), and if the report be under an order re-committing a former report, the cause may be heard *immediately*. (V. C. 1873, c. 171, § 10.) And so much importance is attached to this interval, after the report, before a decree, that it is error to hear the cause within that period, for which; even though the bill be taken for confessed, the decree is reversed. (Gray v. Dickenson, 4 Grat. 87.)

4<sup>a</sup>. The *Classes of Persons* as to whom *Orders of Account* are most *Frequent*.

The persons in respect to whom orders of account are most frequently made are the following, namely:

1, Personal representatives,—that is, executors and administrators, &c.

See 2 Rob. Pr. (1st ed.) 367 & seq; 1 Stor. Eq. § 530 & seq.

2, Guardians.

See 2 Stor. Eq. § 1356 & seq; 3 Dan. Ch. Pr. 2082 & seq.

3, Curators, Committees of lunatics, &c.

See V. C. 1873, c. 118, § 24; Id. c. 123, § 6; Id. c. 82, § 43 & seq.

4, Trustees.

See 1 Stor. Eq. § 465 & seq; Harvey v. Steptoe, 17 Grat. 289.

5, Partners.

See 1 Stor. Eq. § 659 & seq; Foster v. Rison, 17 Grat. 321; Robertson v. Read, 17 Grat. 544.

5<sup>a</sup>. The *Modes of Settling Accounts*, especially of *Executors and Administrators*.

We may develop this subject under the three heads of (1), The statutory provisions intended to secure a due accountability on the part of personal representatives, and other fiduciaries; (2), The rules governing the settlement of the accounts of personal representatives;

and (3), The exceptions to the reports of commissioners who settle such accounts, and the re-commitment of the accounts to the commissioner;

W. O.

- 1<sup>h</sup>. The Statutory Provisions which in Virginia, are intended to *secure a due Accountability* on the Part of Personal Representatives and other Fiduciaries.

The statutory enactments which are designed to secure a due accountability on the part of personal representatives, and other fiduciaries, are consummately wise in conception, and well nigh perfect in the scope and purport of their provisions. They proceed upon the just idea, that persons who assume fiduciary relations usually set out with honest purposes, and that the deplorable lapses from integrity which so often occur with persons so situated, are generally to be ascribed to the want of due care in the beginning, to ascertain and record the exact property which comes to their hands, and then to the omission to make frequent settlements of their accounts in the progress of discharging their duties. Accordingly, the enactments in question are directed (1), To designate some *single officer of each court of probate* in the commonwealth, whose special duty it shall be to compel such fiduciaries to conform to the regulations prescribed for their government; (2), To constrain such fiduciaries to *make and file inventories* of the effects in their hands; (3), To constrain them to *file accounts of sales* made by them; (4), To exact *annual settlements* of their accounts; and (5), To require the court to *withdraw the fund* from their hands if it shall seem likely to be wasted;

W. C.

- 1<sup>i</sup>. Designation of a *special Officer* to compel Fiduciaries to conform to the *Regulations* prescribed for their Government.

The judge of each court having jurisdiction of the *probate of wills and granting administration*, shall designate one of its commissioners in chancery, who is to be known as *the commissioner of accounts*, and who, besides his other duties, shall have a general supervision of *all fiduciaries who qualify in his court*, and shall make *all ex parte settlements* of the accounts of such fiduciaries. To that end, such commissioner is to keep a record showing in separate columns all needful particulars, as is exhibited in 1 Insts. Com. & Stat. Law, 451; and it is made his duty to note any neglect of duty on the part of the fiduciary in any of the particulars presently to be mentioned, and to com-

pel a prompt compliance with the requirements of the law. And if need be another of the commissioners of the court is to be appointed from time to time to aid him. (V. C. 1873, c. 128, § 1 & seq, § 16 & seq; Id. c. 123, § 13; Matt. Comm'rs, 28.)

2<sup>d</sup>. Filing of *Inventories by Fiduciaries* of the Effects in their hands.

Every personal representative, guardian, curator or committee, shall, *within four months* from his qualification, and within every four months from each subsequent accession of estate, return to the *commissioner of accounts* an inventory of all the personal and real estate which has come to his possession or knowledge, or which is under his management, or subject to his authority in his fiduciary capacity; and if upon inspection, such inventory be found in proper form, the commissioner is to deliver it to the clerk of his court to be recorded. Upon failure to return such inventory, the commissioner is *ex officio* to issue a summons requiring it to be done; and if the default continues for thirty days from the service of the summons, the party is to be reported by the commissioner to the court, which is to summon him to appear at the following term to excuse himself; and unless then excused for sufficient reason, he is to be fined by the court from \$50 to \$500; and if he still continues in default is to be dealt with as guilty of a contempt of court. (V. C. 1873, c. 128, § 4; 1 Insts. Com. & Stat Law, 452.)

3<sup>d</sup>. Filing *Accounts of Sales made by such Fiduciaries*.

Such fiduciary, within four months after selling any property, as such, must return to the *commissioner of accounts* an account of such sale, which the commissioner is to inspect, and if in proper form, deliver it to the clerk of the court to be recorded. (V. C. 1873, c. 128, § 5.) It does not appear that any specific action is specially required of the commissioner of accounts, in case of the neglect of this injunction, nor is any specific penalty affixed to it except in the case of *a trustee* in a deed of trust who forfeits his commissions on the sale. But it is apprehended to be the duty of the commissioner to proceed to exact the performance of this duty by the fiduciary, as well as other like duties.

4<sup>d</sup>. The *Annual Settlement* of the Fiduciary's Accounts.

A statement of *all money* which any personal representative, guardian, curator or committee, shall have received, or become chargeable with, or have dis-

bursed, within one year *from the date of the order conferring his authority*, or within *any succeeding year*, together with the vouchers for such disbursements, shall, *within six months* after the end of every such year, be exhibited by him before *the commissioner of accounts* of the court wherein the order conferring his authority was made; and such commissioner shall state, settle and report to the court an account of the transactions of such fiduciary according to law. The proceeding against the fiduciary for default in this particular, and the penalty therefor, is the same as in the case of the inventory, (*Supra*, 2<sup>1</sup>); and in addition a forfeiture of *all compensation whatever* for his services during the year, *unless allowed by the court*. Save only where, within six months from the end of any year, the fiduciary has given to the parties entitled a statement of the money received during the year, and *actually settled therefor* with them; and where, within six months from the end of any year, he has laid a *statement of his receipts* within such year before a commissioner in chancery, who may in a *pending suit* have been ordered to settle his account, which is to be certified by the clerk of the court where such suit is pending to the court of probate. (V. C. 1873, c. 128, § 8 to 10.)

5<sup>1</sup>. *Withdrawing the Fund from the Fiduciary's hands, if it seems to be in Danger.*

Upon such statement being laid by the fiduciary before the commissioner of accounts, it is his duty to examine whether the fiduciary has given such bond as the law requires, and whether it is in a penalty and with sureties sufficient. And he may make a like examination at the instance of any one interested; it being declared to be his duty, in either case, to report the result of such examination and inquiry to the court. And when on such report of the commissioner, or on evidence adduced by a surety of the fiduciary, or any other person interested, it appears to be proper, the court shall take the needful steps to prevent loss by exacting new securities, or revoking the fiduciary's powers, and appointing a successor, as it may deem best. But such revocation does not invalidate any previous act of the fiduciary. (V. C. 1873, c. 128, § 17 to 20; *Reynolds v. Zink*, 27 Grat. 29.)

2<sup>h</sup>. *The Rules Governing the Settlement of the Accounts of Personal Representatives.*

The rules which govern the settlement of the accounts of personal representatives may be referred to

the heads following, namely: (1), The time within which such accounts are to be settled; (2), The assets with which a personal representative is chargeable; (3), The disbursements for which a personal representative is entitled to credit; (4), The vouchers expected to be produced by a personal representative, and the subsequent surcharging and falsifying a settlement; (5), The compensation allowed a personal representative; (6), The mode of charging a personal representative, and the decedent's estate respectively, with interest; and (7), The mode of stating the accounts of personal representatives, and the *formula* to be observed by the commissioner;

W. C.

- 1<sup>1</sup>. The *time within which* the Accounts of Personal Representatives are required to be Settled.

The common law ascertains no certain period within which the accounts of a personal representative are required to be settled, but submits it to the *discretion of the court* whence the representative's authority emanates. The policy in Virginia has been for many years more rigid. By statutes first enacted in 1825, such accounts were required to be settled every *two years*; and by the Code of 1849, as we have seen, an *annual* settlement is prescribed, and within six months from the end of each year. The penalty, it will be remembered, of omitting to lay a statement of receipts before the commissioner of accounts within the period prescribed, is not only a heavy fine inflicted by the court, but also that the personal representative forfeits all compensation for his services during that year, *unless allowed by the court*; and so if he submits an imperfect statement, he is to have no commission on what is so omitted, *unless allowed by the court*. (V. C. 1873, c. 128, § 8, 9, 10.) Down to 1867, the court had no discretion to remit this penalty of forfeiture of commissions, however meritorious the administration, (*Wood v. Garnett*, 6 Leigh, 271); but by act of 1866-'7, the forfeiture is exacted, as we have just seen, *unless the commission be allowed by the court*. The original act prior to 1st July, 1850, did not apply to executors acting as *trustees* under wills, in respect to lands. (*Boyd v. Boyd*, 3 Grat. 113); but by the Code of 1849, since 1st July, 1850, it does. See *Morris v. Morris*, 4 Grat. 293.

The student will doubtless recall the two cases already mentioned, (*Ante*, p 1226, 4<sup>1</sup>.) where the forfeiture of commissions is saved, notwithstanding



no *ex parte* settlement takes place, namely, where the personal representative has settled with the *parties entitled*, and where, under an order of court, he has settled his account in a *pending suit*. (V. C. 1873, c. 128, § 8 to 10.)

If there be any time prior to the year whose transactions are under consideration, for which no settlement has been made, the settlement may embrace that period also. (V. C. 1873, c. 128, § 24.)

Any one interested may appear in person, or by his next friend, before the commissioner, and insist or object as if the commissioner, instead of proceeding *ex parte*, were acting under an order of the court of chancery. (V. C. 1873, c. 128, § 24.)

The commissioner, (when the settlement is *ex parte*,) is to fix a time and place to receive proof of debts and demands against the estate; and is to post a notice thereof at the front door of the court house of the county or corporation, on the first day of two successive terms of the county or corporation court. (V. C. 1873, c. 128, § 21.) He may adjourn from time to time, and must make up and complete his account within a year. (V. C. 1873, c. 128, § 22.) But in order still further to assure adequate notoriety to the business, he is required, on the first day of his county or corporation court, to post at the front door of the court house, a list of those fiduciaries whose accounts are before him; and no account is to be completed until ten days after having been mentioned in such a list (§ 23.) He is not required, as formerly he was, to retain the settled account for ten days after completion, but is to return it to court *as soon as practicable*. (V. C. 1873, c. 128, § 27.)

2<sup>d</sup>. The *Assets* with which a *Personal Representative* is *Chargeable*.

A personal representative is properly chargeable with *all the decedent's property*, real or personal, (for our present statutes make him liable for realty committed to him by the will, if there be one, as well as for personalty,) which either did, or by due diligence might have come to his hands, (*Burnley v. Duke*, 1 Rand. 113); even though he got it from another jurisdiction. (*Andrews v. Avory*, 14 Grat. 240.) What this property is, may be discovered from the *inventory or appraisement*; from the *account of sales* of the decedent's effects, which is usually made, at least as to those goods which are *perishable*, shortly after his

death, (V. C. 1873, c. 126, § 12 to 17; Id. c. 128, § 4, 5); and from *extrinsic proofs*.

Besides the proceeds of sale, which are usually charged in a lump, the representative being in strictness liable therefor, as for so much property *converted or administered*, (Clarke v. Wells, 6 Grat. 479; Boaz v. Hamner, 27 Grat. 382), unless he can show that losses of such proceeds occurred without any default on his part; he must account for all the debts due the deceased which he has, or might have collected; also for whatever *emblems* (supposing the deceased to have been seised of land employed in agriculture,) ought by law to have accrued to the estate, (V. C. 1873, c. 135, § 2); and in short, as already observed, for *all the assets* of the decedent, which did, or with due diligence might have come to his hands, to be ascertained, if necessary, by an approximative estimate. (Wills v. Dunn, 5 Grat. 385; Lacy v. Stamper, 27 Grat. 47 & seq.)

In selecting what goods he will sell, in the credit to be given at the sale, and in the manner of collecting the assets of the estate generally, much must be referred to the executor or administrator, whose conduct under the responsibility, if dictated by an honest motive, and guided by ordinary care, is viewed by the courts with much leniency. (McCall v. Peachy, 3 Munf. 392; Hudson v. Hudson, 5 Munf. 180; Boyd v. Boyd, 3 Grat. 113; Powell v. Stratton, 11 Grat. 792.)

If the representative be himself indebted to the decedent, (the executorship constituting, with us, no release of the debt, V. C. 1873, c. 126, § 13,) he is to be charged with the amount, if he be solvent, and at any rate, it is believed, to the *extent of his commission*. (Decker v. Miller, 2 Pai. (N. Y.) 149.) The debts which he collects will be charged to him, as at the *time of collection*, of which his own account, fortified by his oath, is *prima facie* evidence. (Cavendish v. Fleming, 3 Munf. 198; Quarles v. Quarles, 2 Munf. 321.) But such as by his negligence or improper conduct he loses, he is to be charged with as at the time when they ought to have been received, with interest from that period. (V. C. 1873, c. 128, § 7.)

It may be added that it is considered the duty of the executor or administrator to keep the accounts of his trust with accuracy; and if he fails to do so, he does not thereby exempt himself from, but rather the

more exposes himself to a rigid accountability. (Kee v. Kee, 2 Grat. 116.)

- 3<sup>d</sup>. The *Disbursements* for which a Personal Representative is entitled to be credited.

A personal representative is to be allowed in the settlement of his accounts, not only all reasonable expenses incurred in the discharge of his duty, including funeral expenses and charges of administration, (V. C. 1873, c. 126, § 25) but also, except where it is otherwise provided, a reasonable compensation, in the form of a commission (*on receipts*), or otherwise. (V. C. 1873, c. 128, § 25.) And this in preference to the claim of any creditor. (Nimmo's ex'or. v. Com'th. 4 H. & M. 57.) Thus an executor or administrator is credited by fees paid to counsel, although exceeding the rate allowed by law, where such rate is prescribed, supposing them to be not immoderate, (Lindsay v. Howerton, 2 H. & M. 9); and under particular circumstances by clerk's hire, rent of a counting-room, postage, and travelling expenses, where the *necessary* magnitude of such expenditures makes it unreasonable to throw them upon the personal representative himself; but in general these *incidental expenses* of administration are considered to be fairly covered by the commission. (Hipkins v. Bernard, 4 Munf. 83.) So likewise, commission to an agent for money collected is not usually allowed in addition to the personal representative's own commission, unless the debtor reside at such a distance (*e. g.*, in another county), as to make it reasonable to employ the agency of a third person. (Carter v. Cutting, 5 Munf. 223.)

Of course, credit must be given for all the debts due from the decedent, which have been *properly paid*, whether due to the personal representative himself or to another. (Decker v. Miller, 2 Pai. (N. Y.) 149; Page v. Patton, 5 Pet. 304; Cookus v. Peyton, 1 Grat. 431; Morris v. Morris, 4 Grat. 293; Williams Williams, 11 Grat. 95.) It was always admitted that if it appeared *on the face of a security for a debt*, that it was tainted with any illegality, such as gaming, or the like, the personal representative could not lawfully pay it, and if he did pay it, could not be credited with it in the settlement of his accounts. (Carter v. Cutting, 5 Munf. 223.) But it seems that at common law, if the representative merely *has reason to believe*, or even if he *knows* of the invalidity of the demand when yet it does not appear *on the face of the security* evidencing the claim, he is not *bound* to assert such in-

validity, and to endeavor to repel the demand. Thus it seems to have been long considered that he was not obliged to plead the statute of limitations. (Toll Ex'ors, 428); and although a different opinion is intimated in *Tunstall v. Pollard*, 11 Leigh, 37-'8, founded on *dicta* in several English and American cases, as *McCulloch v. Dawes*, 9 Dowl. & R. (22 E. C. L.) 40; *Shawen v. Vanderhorst*, 1 Russ. & My. (5 Eng. Ch. R.), 347; *Rogers v. Rogers*, 3 Wend. 503, yet the case of *Tunstall v. Pollard* was decided upon the particular terms of a statute touching limitations of judgments against decedents, and the question has been only finally concluded in Virginia by the code of 1849, which wholesomely provides that if any personal representative "shall pay any debt, the recovery of which could be prevented by reason of illegality of consideration, lapse of time, or otherwise, *knowing the facts* by which the same could be prevented, no credit shall be allowed him therefor." (V. C. 1873, c. 128, § 7.)

The courts, not unwisely, are more stringent in examining the claims of the executor or administrator himself than those of other persons which he has paid. Hence he has been refused credit for a debt due *himself* barred by the statute of limitations, when he would not have been obliged to plead the statute to a stranger's demand, (*McCulloch v. Dawes*, 9 Dowl. & R. (22 E. C. L.) 40; *Rogers v. Rogers*, 3 Wend. (N. Y.) 503, 517; *Seig v. Acord*, 21 Grat. 369, &c.); and also for a demand for nursing his father-in-law (the decedent) in his last illness, no promise of remuneration being proved, and the relation between the parties forbidding the conclusion that any should have been expected. (*Williams v. Stone-street*, 3 Rand. 559.)

- 4<sup>1</sup>. The *Vouchers expected to be produced* by a Personal Representative, and the subsequent *Surcharging and Falsifying* of a Settlement of his Accounts.

The *vouchers* upon which a personal representative is to be allowed his credits are such as reasonably satisfy the mind of the justice and validity of the claim which he makes. Evidences of debt, acknowledged *in writing* by the decedent in his life-time, need only to be *received* by the creditor, although if it be denied, the genuineness of the receipt must be satisfactorily proved, like any other writing which is sought to be used in evidence for a collateral purpose. But open accounts and demands, not acknowledged in

writing, ought to be sustained by the affidavit of the alleged creditor, or of some one on his behalf, as well as receipted by him. The ordinary and reasonable expenses of administration incurred by the personal representative may be proved by the receipt therefor, with proof of its genuineness if controverted; or where the nature of the *item* is such that a written receipt cannot be looked for, as in case of postage, railroad fare, trifling services by a colored or illiterate person, and the like, it may be allowed on the oath of the fiduciary himself. (*McCall v. Peachy*, 3 Munf. 288; *Beverly v. Miller*, 6 Munf. 99.)

Such of the vouchers as the commissioner may think proper, or any one interested may desire, he is to return to the clerk's office, together with the statement of the account. The rest he ought to retain safely until the court confirms his report, and then, if not wanted for any further inquiry, to restore to the party who filed them. (V. C. 1873, c. 128, § 28.)

The mere rendering an account to a debtor, to which he makes no objection, affords not sufficient evidence, even *prima facie*, as has been sometimes thought, of its correctness, save as between merchants, by the custom and usage of the class to which they belong. There must in general be proof to show that the debtor has, by language or conduct, admitted the account to be just. So also the *keeping* in one's possession of the account rendered without objection, does not, amongst persons other than merchants, warrant the presumption that its justice and accuracy are admitted. (*Robertson v. Wright*, 17 Grat. 541.) And hence, *a fortiori*, an account formerly stated in pursuance of a decree of court, in a suit *inter partes*, although *confirmed* by the court, is not even *prima facie* evidence against persons who were *not parties* to the first suit, nor *in privity* with any party thereto. (*Mason v. Peters*, 1 Munf. 437; *Street v. Street*, 11 Leigh, 498; *Robertson v. Wright*, 17 Grat. 540; *Deneale v. Stump*, 8 Pet. 528.) On the other hand, an *ex parte* settlement, officially made, is *prima facie* evidence of the several charges and credits contained therein, (2 Rob. Pr. (1st ed.) 113; *Boyd v. Oglesby*, 23 Grat. 689); an effect which has been referred to the long-established practice of the country, (*Newton v. Poole*, 12 Leigh, 142); although it would seem rather to proceed from the principle that such *ex parte* proceedings are *in rem*, and therefore obligatory alike upon every body. (1 Greenl. Ev. § 541, 544 &

seq; 7 Rob. Pr. 306, 324, 345, 350, &c.; *Ante*, p. 721.) But to whatever principle referrible, the doctrine in Virginia is confirmed expressly by statute, when the court has approved the report of the commissioner. (V. C. 1873, c. 128, § 29.) Yet, notwithstanding this *prima facie* evidence of the several charges and credits contained in the administration account, afforded by the *ex parte* settlement, any person interested may, by bill in equity, *surcharge and falsify* the whole or any part of it, if he can produce satisfactory evidence for that purpose. (V. C. 1873, c. 128, § 29; *Anderson v. Fox*, 2 H. & M. 260; *Nimmo v. Commonwealth*, 4 H. & M. 57; *Atwell v. Milton*, 4 H. & M. 253; *McCall v. Peachy*, 3 Munf. 288; *Preston v. Gressom*, 4 Munf. 110; 1 Stor. Eq. § 523 & seq; 1 Dan. Ch. Pr. 424; 2 Do. 764; *Matthews v. Wallwun*, 4 Ves. 129, n (1); *Chambry v. Goldwin*, 5 Ves. 834, n (6); S. C. 9 Ves. 266.)

A bill to surcharge and falsify an *ex parte* settlement must specify the particulars wherein it is supposed to be erroneous. (*Lee v. Stuart*, 2 Leigh, 76; *Garrett v. Carr*, 3 Leigh, 407; *Shugart v. Thompson*, 10 Leigh, 443-'4; *Corbin v. Mills*, 19 Grat. 465.) And if the answer to the bill discloses nothing improper in the account, and the complainant exhibits *no evidence* to sustain his allegations, the bill should be dismissed. (*Wyllie v. Venable*, 4 Munf. 369.) But while the plaintiff is thus held to a *specification of particulars* of surcharge and falsification, it is always competent to him to show that *upon its face* the account contains mistakes; as for example, that without controverting the items themselves, they have been *so arranged*, or *so summed up* as to produce results injurious to him. (*Lee v. Stuart*, 2 Leigh, 76; *Garrett v. Carr*, 3 Leigh, 407; *Burwell v. Anderson*, 3 Leigh, 348; *Newton v. Poole*, 12 Leigh, 112.)

On such a bill to surcharge and falsify the accounts as settled, if a decree be made for a new settlement, and the vouchers referred to in the former account cannot still be produced, they will be presumed to have existed; although if produced, the plaintiff may controvert their force and effect. In every such case the burden of proof is thrown on the complainant, and no change shall be made in the accounts except in cases justified by satisfactory evidence. This rule is to be strictly adhered to where there has been a considerable lapse of time (2 Rob. Pr. (1st ed.) 115; *McCall v. Peachy*, 3 Munf. 295; *Tabb v. Boyd*, 4

Call. 453.) Hence, if it be alleged that certain entries of debts against the fiduciary are post dated, the dates may not be changed, unless in pursuance of satisfactory proof. (*McCall v. Peachy*, 3 Munf. 301.)

5<sup>1</sup>. The *Compensation to be allowed* a Personal Representative.

The compensation of the executor or administrator, which is to be deducted every year before the balance is struck, consists usually of a *commission on receipts*, although under circumstances, it may be in the discretion of the court in some other form. The statute enacts that, "The commissioner in stating and settling the account, shall allow the fiduciary any reasonable expenses incurred by him as such, and also, except in cases in which it is otherwise provided, a reasonable compensation, in the form of a commission (on receipts) or otherwise." (V. C. 1873, c. 128, § 25.)

This compensation, like all the other expenses attending the administration, has priority over all debts due from the decedent. (*Nimmo v. The Comm'th*, 4 H. & M. 57.) It is fixed by usage, for the most part, at *five per cent. on actual receipts*, and, as has been observed, is to be credited to the executor or administrator, each year before the accounts are closed, and a balance struck. (*Taliaferro v. Minor*, 2 Call. 156; *Granberry v. Granberry*, 1 Wash. 249; *Hipkins v. Bernard*, 2 H. & M. 21; *Triplett v. Jameson*, 2 Munf. 242; *Sheppard v. Starke*, 3 Munf. 29; *Ferneyhough v. Dickinson*, 2 Rob. 582; *Boyd v. Oglesby*, 23 Grat. 688-'9.) But whilst five per cent. on receipts is the usual allowance, the *principle* is that the fiduciary shall have a fair remuneration for this *trouble, risk, and responsibility*. It may, therefore, on occasion, be *less*, and under peculiar circumstances, may be *more*. Thus, *seven and a half per cent.* has been allowed when the will directed the estate to be kept together, and managed by the executor or administrator; and even as much as *ten per cent.* in a case where the debts to be collected were small and numerous, and the debtors dispersed; and so, when the personal representative is subjected to great and unusual trouble, and extraordinary expense. (2 Rob. Pr. (1st ed.) 370; 2 Lom. Ex. 543-'4 & seq; *Fitzgerald v. Jones*, 1 Munf. 150; *Cavendish v. Fleming*, 3 Munf. 198; *McCall v. Peachy*, 3 Munf. 397; *Boyd v. Oglesby*, 23 Grat. 688-'9.)

The commissioner is charged, as we have seen, on *actual receipts*, under which designation is included

not only all money on hand at the decedent's death, and all which may afterwards have come to his hands, but also all debts due by mortgage or otherwise, which he might have collected, but turns over to the distributees or legatees, with their consent, just as he received them; and likewise all *perishable effects* which he had power to sell, but which, by consent of the legatees, or distributees, he delivered to them *in kind*. (Granberry v. Granberry, 1 Wash. 249; Hipkins v. Bernard, 4 Munf. 92; Ferneyhough v. Dickinson, 2 Rob. 582; Claycomb v. Claycomb, 10 Grat. 589.)

It has been held, however, it would seem very anomalously, that the fiduciary is not entitled to commission on a *debt due from himself*, which he accounts for as a *debit* against him, (Ferneyhough v. Dickinson, 2 Rob. 582), a decision which appears to lose sight of the fact that the commission is allowed, not for collecting merely, but for keeping and disbursing also, and for all the other trouble, risk and responsibility which are incident to the office. Commissions can of course be allowed but once *on the same capital*, so that where money which has been received, is put out and again collected, the fiduciary is not entitled to a second commission. (McCall v. Peachy, 3 Munf. 297.) Commission being intended as a recompense for the fiduciary's personal trouble, risk and responsibility, if there be two executors, and one of them performs all the labor, he ought to be allowed all the compensation, (Claycomb v. Claycomb, 10 Grat. 589, 593); and where an executor committed the whole business to another person, who acknowledged that he acted as a friend and relative, and through kindness, such person was not allowed in New York any remuneration. (Mason v. Roosevelt, 5 Johns. Ch. R. (N. Y.) 534.) And so if the testator bequeaths him a legacy, commission is usually disallowed, the legacy being presumably designed as a recompense for his trouble, &c. (Jones v. Williams, 2 Call. 102.) Hence, if there be several executors, and legacies are given to all, impliedly or expressly as a remuneration for their services; and one performs the whole service, he will be entitled, it seems, to *all the legacies*. The presumption, however, that the legacy is designed as a compensation is liable to be rebutted by any circumstances which show that the testator intended otherwise. Thus, if the bequest be to the executor, "as being his nephew," or if unequal bequests be made to several co-executors, the commission is allowed in addition to the legacy



(Granberry v. Granberry, 1 Wash. 246.) And it is presumed, that a commission would be allowed an executor, notwithstanding a legacy to him, if the debts exhausted the assets, so as to leave nothing to satisfy the legacy.

So fixed is the rule allowing as compensation to a personal representative *five per cent* commission on receipts, that if the testator directs that his executor shall be *handsomely paid*, and there be no extraordinary trouble or responsibility in the administration, he will be allowed only the usual *five per cent*. (Waddy v. Hawkins, 4 Leigh, 458.)

6<sup>1</sup>. The Mode of Charging the *Personal Representative* and the *Decedent's Estate* respectively, *with Interest*.

It will be remembered, that the statement of the administration account is to be annually closed, and a *balance struck*, at such period near the anniversary of the commencement of the administration as may seem to the commissioner most convenient, observing that the time for the opening and closing of the *executorial year* having been once fixed on, it is not proper in subsequent years to adopt a different time. With the balance struck at the close of the preceding year, whether for or against the fiduciary, the next year's statement commences. and *interest is charged thereon through that year*, in pursuance of the maxim that it is natural justice that he who has the use of another's money should pay interest on it. (Jones v. Williams, 2 Call. 105.) *Compound interest*, however, is not in general to be charged against either the estate or the personal representative; indeed, against the estate never, nor against the representative, except where he has used the money of the estate in trade, and *will not disclose the profits* which have accrued: or except where he has acted as *quasi guardian* as well as executor, in which latter case the account, after the administration proper is completed, or a sufficient time has elapsed to complete it, is to be adjusted upon the principles of a guardian's account, charging the fiduciary with interest upon the annual balances, notwithstanding they consist, in part or wholly, of interest. (1 Insts. Com. & Stat. Law, 455; Lewis v. Bacon, 3 H. & M. 89; Garrett v. Carr, 3 Leigh, 407; S. C. 1 Rob. 196; Evans v. Pearce, 15 Grat. 515.)

It is not usual to charge interest on the several items of receipt or disbursement during the year, because it would be expensive to consume so much time as would be required by the calculations, and for the

most part the difference in the result, to either party, would be trivial. If, however, large items of receipt or disbursement occur *early in the year*, the usual practice (which is a *mere rule of convenience*) must be departed from, where it shall appear to be necessary in order to do justice to the parties. In the event that it shall be deemed proper to compute interest on the separate items, it is to be observed that on items of *disbursement* interest is reckoned *from their date*, whilst on *receipts* a sufficient period after the receipt, to enable the fiduciary to invest the money, must be allowed before the interest shall begin. This interval is fixed by the courts, rather unreasonably, at *six months*, whilst as to *guardians* the legislature has fixed it, still more unreasonably upon the other side, at *thirty days*. (Fitzgerald v. Jones, 1 Munf. 150; Burwell v. Anderson, 3 Leigh, 364; 1 Insts. Com. & Stat. Law, 454-'5; V. C. 1873, c. 123, § 12.)

It has sometimes been said, that when the annual balance consists in part of *estimated or conjectural rents, hires, and profits*, no interest is to be charged on such part, any more than on interest accrued. (Whitehorne v. Hines, 1 Munf. 557; Dillard v. Tomlinson, 1 Munf. 183; Baird v. Bland, 5 Munf. 240; Payne v. Greene, 2 Leigh, 561; Roper v. Wren, 6 Leigh, 38.) The true principle, however, appears to be, that interest is to be allowed even upon *estimated or conjectural profits*, whether actually received or not, if it was the *fiduciary's duty to have received them*. (Gross v. Gross, 4 Grat. 265; Rosser v. DePriest, 5 Grat. 6.)

If by negligence or improper conduct the fiduciary loses any debt, he is to be charged, not only with the principal, but with the *interest thereon*, as if he had received it. (V. C. 1873, c. 128, § 7.)

Where the annual balance is *against the personal representative*, the estate is allowed interest thereon during the ensuing year, like any other creditor; but the disbursements made by the executor in the course of that year are, at its close, to be applied, not first to discharge the *interest*, and then the principal, as in ordinary cases, but out of indulgence to the fiduciary to *extinguish the principal altogether*, before a dollar is devoted to the interest. On the other hand, when the balance is in favor of the executor or administrator, he is allowed interest thereon during the year following, as the estate was; but the monies he receives in the course of that year go, as in the case of an ordi-

nary debtor, to the *interest first*, and afterwards to the principal, thus leaving the *interest-bearing fund undiminished* until all the interest accrued thereon has been liquidated. This is a mighty advantage in favor of the personal representative, and is accorded to him because, whilst the payment of debts due from the estate is in progress, he must of necessity keep more or less money lying idle by him in order to meet the demands which may at any time be presented, and during that period of his administration it is proper to deal leniently with him in respect to the payment of interest on balances. But when the debts are paid, or there has been time to pay them, and the executor or administrator has only legacies and distributive shares to deal with, the reason of the indulgence is at an end, and he is thenceforward treated and settled with upon the footing of *an ordinary debtor and creditor*.

This important diversity in the mode of stating the interest-account, where the personal representative is debtor in the annual balance, and where the estate is debtor, may be best understood by studying the statement of an administration-account. Post, 1246-'47.

The method above described of stating the accounts of personal representatives having been indicated in *Granberry v. Granberry*, 1 Wash. 246, and fully explained in *Burwell v. Anderson*, 3 Leigh, 348, has been repeatedly illustrated in subsequent cases, as in *Garrett v. Carr*, 3 Leigh, 407; *Handley v. Snodgrass*, 9 Leigh, 484; *Street v. Street*, 11 Leigh, 498; *Newton v. Poole*, 12 Leigh, 112; *Kee v. Kee*, 2 Grat. 116; *Corbin v. Mills*, 19 Grat. 458.

This mode of stating the accounts of a personal representative is deviated from, as has been intimated, where such representative is charged by the decedent's will with putting the estate out at interest, and managing it as the *quasi guardian* of infant legatees. He is then regarded as a *de facto* guardian, and must settle his accounts after the much more rigorous doctrine applicable to that class of fiduciaries. (1 Insts. Com. & Stat. Law, 455.)

If he *properly* invests the money belonging to his trust, he will be liable only for the interest which he actually received or ought to have received. But if he keeps the money himself, he is regarded as a *borrower of the annual balance*, and must pay interest on the whole of it, including interest, deducting therefrom all proper disbursements. (*Garrett v. Carr*, 3

Leigh, 407; S. C. 1 Rob. 196; *Handley v. Snodgrass*, 9 Leigh, 484.)

It will be remembered, that compound interest is in all cases to be charged against every personal representative who has employed the funds of the estate in trade, and will not disclose the profits. (*Evertson v. Tappan*, 5 Johns. Ch. R. (N. Y.) 497; *Schieffelin v. Stewart*, 1 Johns. (N. Y.) 620.)

Administration accounts are always to be closed as soon as the debts are paid, and the transactions will permit, or after the lapse of a reasonable time for that purpose. Payments made to legatees and distributees ought never to enter into the *general account*, both to prevent confusion and because the accounts between them and the personal representative are adjusted like those between ordinary debtor and creditor, and not upon the same indulgent principles towards the representative which regulate the general administration-accounts. As soon as the final balance of that general account is struck, the portions of the several legatees and distributees are to be ascertained, and thenceforward a *separate account is to be stated with each*, and is kept strictly as an account of *debtor and creditor*, charging interest on the balance due, and applying payments to the liquidation of the *interest first*, (unless the contrary be agreed by the parties), and then of the principal. (*Garrett v. Carr*, 3 Leigh, 416; *Handley v. Snodgrass*, 9 Leigh, 184. But see *Jackson v. Jackson*, 1 Grat. 148.)

And although in a case of a debtor *in his own right*, no interest is demandable where the creditor is out of the commonwealth and has no agent or attorney here, and especially if the creditor be an *alien-enemy*, (*McCall v. Turner*, 1 Call. 139-'40; *Brewer v. Hastie*, 3 Call. 24; *McVeigh v. Bank of Old Dominion*, 26 Grat. 188; *Roberts v. Cocke*, 28 Grat. 212-'13; *Brown v. Hiatts*, 15 Wal. 177); yet in the case of any fiduciary, the obligation to pay interest is not affected by the absence abroad, nor even by the non-existence of the person entitled to the money, nor as is presumed by his hostile alienage, because a fiduciary has always access to a court of chancery, into which he may put the money in his possession, and the court will direct its investment; and if instead of doing so, he chooses to retain the fund in his own custody, *he must pay interest on it*. (*Burwell v. Anderson*, 3 Leigh, 438; *Anderson v. Burwell*, 6 Grat. 405; *Bourne v. Mechan* (Michie), 1 Grat. 292; *Lyon v. Magagnos*, 7 Grat. 379.)

7<sup>1</sup>. The Doctrine touching the *Responsibility* of a Personal Representative for *Transactions in Confederate Currency*.

Something must be said, whilst treating of the accounts of executors and administrators, and the adjustment thereof, touching the doctrine established in respect to their transactions with Confederate currency.

Apart from any statute, a personal representative, like every other fiduciary, is by the common law entitled to demand the advice and instruction of the court of chancery, and is safe in acting *bona fide* under its direction in whatever concerns his duty relative to the trust committed to him, and this doctrine has been often applied to *investments* of the funds in his hands. Thus, if he invest in mere *personal securities*, how unexceptionable soever, but not based on real estate, or on some other thing of durable value; or in stocks in which the court of chancery is not accustomed to direct funds under its control to be invested; or if he suffers the fund to remain upon the personal security on which the decedent had himself placed it; in all these cases the investment is at his peril, and he must answer for it if it be lost. But if he invests under the *direction of the court*, he is exonerated from all liability, supposing that there is no collusion, and *mala fides* in the transaction. (2 Insts. Com. & Stat. Law, 219 & seq; 2 Stor. Eq. § 1273 & seq; Whitehead v. Whitehead, 23 Grat. 381.) But the authority thus to instruct fiduciaries, is reposed at common law *in the court*, and *not in the judge in vacation*; and as the exigencies of the late civil war would not always admit of even a short postponement of such action, until the next term of the court; and as, moreover, in some districts of the State, the terms of the courts were held irregularly, personal representatives and other fiduciaries were in danger of great embarrassments and losses.

The legislature convened at Richmond, therefore, anticipating trouble from cases of this sort, provided for them by Act of March 5, 1863, which, as being the law prescribed by the *de facto* government of the commonwealth for the time being, regulated all the instances coming properly within its terms as long as that government subsisted, that is until April 10th, 1865. The act provides that "Whenever any guardian, curator, committee, or other fiduciary or trustee may have in his hands, moneys received in the *due exercise of his trust*, belonging to the estate or trust fund

held by him as fiduciary or trustee, which moneys any such fiduciary or trustee may, from the nature of his trust, or from any cause whatever, *be unable to pay over* to the *cestui que trust*, or parties entitled thereto, it shall be lawful for such fiduciary or trustee to apply by motion or petition, to *any judge* of a circuit court in vacation, for leave to invest the whole or any part of such moneys in the interest-bearing bonds or certificates of the Confederate States, or of the State of Virginia, or any other sufficient bonds or securities of or within the said State; and the said judge may in his discretion grant such leave; \* \* \* and whenever such investment shall be made, such fiduciary or trustee shall be released from responsibility for the moneys thus invested; but it shall be his duty to preserve the bonds thus taken, and to exercise due diligence in collecting the interest accruing thereon, and in making a proper application thereof; *provided* that nothing herein contained shall authorize said fiduciary to change the character of an existing investment made under the provisions of this law, until authorized by the *decree of a circuit court* of competent jurisdiction; and *provided further*, that the provisions of the foregoing section shall not be so construed as to interfere *with the powers now exercised by courts of chancery over the subject.*" (Acts, 1862-'3, of Richmond Leg. p. 81, c. 46.)

This act, in order to make it applicable, requires these three conditions, and if in any instance those three conditions do not concur, the direction of the *judge* affords no protection to the fiduciary. Those three conditions are as follows:

(1), The money, at the time of the application, must be *in the hands* of the fiduciary, not merely expected to come to his hands.

(2), It must have been received *in the due exercise of his trust.*

(3), He must, for some cause, be *unable to pay it over to the party entitled.*

These principles have been reiterated in several cases, and may be regarded as established. (Campbell v. Campbell, 22 Grat. 684; Crickard v. Crickard, 25 Grat. 421; Kirby v. Goodykoontz, 26 Grat. 302.)

Investments in Confederate securities during the war, where the executor was authorized or directed by the will to sell the lands, and to hold the money in his hands, or loan it until the testator's children become of age, are a legitimate exercise of the execu-

tor's discretion (he having acted in good faith), and expose him to no liability for the loss of the investment. (*Fugate v. Honaker*, 22 Grat. 412-'13.) This is, indeed, nothing more than the application of an old principle, which has long governed trusts of all kinds, namely, that nothing more should be required of a trustee than to act in good faith, and with the same prudence and discretion that a prudent man is wont to exercise in the management of his own affairs; for to demand more than this is to discourage the most suitable men from undertaking the office of trustee or fiduciary. (2 Stor. Eq. § 1271, 1272; *Knight v. Lord Plymouth*, 3 Atk. 480; *Wilkinson v. Stafford*, 1 Ves. Jr. 32; *Vezo v. Emery*, 5 Ves. 141; *Hart v. Ten Eyck*, 2 Johns. Ch. R. (N. Y.) 62; *Thompson v. Brown*, 4 Johns. Ch. R. 619, 628-'9; *Taylor v. Benham*, 5 How. 233; *Elliott v. Carter*, 9 Grat. 541, 559, 560; *Myers v. Zetelle*, 21 Grat. 758; *Davis v. Harman*, 21 Grat. 200 & seq; *Fugate v. Honaker*, 22 Grat. 412-'13; *Staples v. Staples*, 24 Grat. 248-'9; *Mills v. Mills*, 28 Grat. 477 & seq.) And so by parity of reason, if property is *properly sold*, (as under the explicit directions of a will, or of a competent court,) for Confederate currency, it is not wrong in the executor to receive such money. (*Staples v. Staples*, 24 Grat. 242 & seq; *Mills v. Mills*, 28 Grat. 476 & seq.)

An executor or administrator, however, cannot in general be justified for receiving Confederate notes, or any depreciated currency, for a debt or demand payable in gold, except under peculiar circumstances, which may be enumerated thus:

(1), Where *ample and unlimited authority* has been conferred by the will, and the fiduciary acts in *good faith*, and with *reasonable prudence and caution*;

(2), Where the *necessities of the estate require it*;

(3), Where it can be used *without loss to pay debts due from the estate*;

(4), Where the legatees or distributees, to whom it is payable, consent to receive it, without disadvantage to the estate; and

(5), Where the *security is so doubtful* that it is better to take the depreciated currency than the *risk of total loss*.

See *Myers v. Zetelle*, 21 Grat. 752 & seq; *Staples v. Staples*, 24 Grat. 242 & seq; *Mills v. Mills*, 28 Grat. 476 & seq; *Campbell v. Campbell*, 22 Grat. 686; *Moss v. Moorman*, 24 Grat. 97; *Williams v.*

Skinker, 25 Grat. 507, 529; Tosh v. Robertson, 27 Grat. 277 & seq; Ward v. Smith, 7 Wal. 452.

In conclusion, it may be observed, that a fiduciary who makes investments, or deposits trust-money in his own name, without designating in some way, or describing it as the property of the trust, will be held liable for any loss that may accrue, not only because, if it were not so, he would be able to throw upon the *cestui que trust* the hazards of his own business, by pretending that the fund on which the loss has fallen was the *cestui que trust's*; but also because, by mingling the trust-money with his own, he has made it all his, and has thereby become a debtor to the fund. On the other hand, if he separates the trust-money from his own, by depositing it in bank to a different account, such as to his account as fiduciary, or to "collection account;" or if he deposits it in his own name in a bank in which he has no funds of his own, he is answerable only for due prudence in the selection of the depositary, and due vigilance in respect to such depositary's continued solvency. (2 Lead. Cas. Eq. (Part II), ed. 1877, p. 1805; Pidgeon v. Williams, 21 Grat. 251; Davis v. Harman, 21 Grat. 194, 203; Vaiden v. Stubblefield, 28 Grat. 162 & seq.)

- 8i. The Mode of *Stating the Accounts* of Personal Representatives, and the *Formula* to be observed by the Commissioner.

The mode of stating the accounts of personal representatives was very irregular and inaccurate, until it was carefully elaborated, and its principles set forth and illustrated by Judge Tucker, in Burwell v. Anderson, 3 Leigh, 363, 832, founded upon Granberry v. Granberry, 1 Wash. 249. The *formula* suggested in Burwell v. Anderson has since been approved in several subsequent cases, and amongst others in Handley v. Snodgrass, 9 Leigh, 484, and commissioners in chancery in Virginia are expected to observe it. It merits, therefore, the student's assiduous attention.

As we have seen, the commissioner submits, along with his formulated statement of the accounts, a report setting forth the results to be deduced from the statement, and accompanied by a copy of the order or decree under which he acted, and of the notice whereby he convened the parties before him. It will assist the student's comprehension of the proceeding to present a form of these several transactions.



## REPORT OF MASTER-COMMISSIONER.

*Commissioner's Office, C—, — day of —, 18—.*

The undersigned, in pursuance of a decretal order of the circuit court for the county of A, pronounced on the — day of —, in the year —, in a cause in chancery in the said court depending between James Hart, complainant, and Jane Hart, in her own right, and as administratrix with the will annexed of Thomas Hart, deceased, and others, defendants, an office-copy of which decree, or an extract therefrom is hereto annexed, having given due notice to the parties concerned, as will appear by the notice herewith returned, proceeded on the — day of —, in the year —, to execute the said order; and the proceedings having been thenceforward regularly adjourned from time to time, and being at length completed, the result is herewith respectfully submitted.

The undersigned ascertains upon a settlement of the accounts of Jane Hart's administration with the will annexed of the estate of the said Thomas Hart, deceased, that there was a balance in her hands due the estate, on the — day of —, in the year —, when the administration account is closed, amounting to — dollars, of which — dollars is *principal*, bearing interest from the said — day of —, in the year —, until paid.

It was deemed proper to close the administration-account at the period named, because, in the opinion of the undersigned a sufficient time had then elapsed, had proper diligence been employed, to enable the administratrix to complete her administration by the payment of all debts due from the decedent. It appears, however, that she has not done so, and there is still outstanding an alleged bond-debt, claimed to be due to one H. C., amounting to the sum of — dollars, with interest thereon from the — day of —, in the year —. It will, therefore, be necessary, in decreeing against the said administratrix with the will annexed, for the balance appearing against her, to allow her to reserve in her hands a sufficient sum to meet the foregoing demand, subject to future accountability.

The undersigned is of opinion that, in consequence of her failure to make an annual, or any settlement of her administration-accounts during the whole period of her administration, she would be entitled to no compensation whatever by law; but the distributees of the decedent, Thomas Hart, having, by counsel, waived the forfeiture, she is credited with the usual commission from year to year.

The balance in the hands of the administratrix at present distributable, if the foregoing view be adopted, is as follows:

Amount now due from the defendant, Jane Hart, as administratrix, c. t. a. of Thomas Hart, deceased,	-	\$11,201.87
Deduct amount of bond claimed to be due to H. C.,	\$1,448.16	
Deduct interest from — day of — to — day of —,	716.76	
		2,164.92
Leaving now ready for distribution,	-	\$9,036.95
The distributive shares are, consequently, as follows:		
To the defendant, Jane Hart, widow of decedent Thos. Hart, one-third of \$9,036.95,	-	\$3,012.31½
To James Hart, the complainant, one of decedent's four children, ¼th of ¾rds = ⅓th of \$9,036.95,	-	1,506.15½
" John Hart, another of decedent's four children, the same,	-	1,506.15½
" Henry Wells, in right of his wife, Mary, another child, the same,	-	1,506.15½
" Anne Hart, another child, the same,	-	1,506.15½
		\$9,036.95

Respectfully submitted,

M. G., Master-Commissioner.

OFFICE COPY OF DECREE OR OF EXTRACT.

At a Circuit court for the county of A, continued and held on the — day of —, in the year —, at the court-house of the said county:

James Hart, ..... Complainant,  
vs. } In chancery.

Jane Hart, in her own right, and also as administratrix with the will annexed, of Thomas Hart, deceased, John Hart, Henry Wells, and Mary his wife, who was Mary Hart, and Anne Hart, an infant, under the age of twenty-one years, by B. T. her guardian *ad litem*, ..... Defendants.

*Extract from Decree.*

And the court doth further adjudge, order, and decree, that the defendant, Jane Hart, as administratrix with the will annexed of the said Thomas Hart, deceased, do render a full, true, and perfect account of her administration of the estate of the said Thomas Hart, deceased, before one of the commissioners of this court, which account the said commissioner is directed to audit, state, and settle, and make report thereof to the court, together with any matter specially stated deemed pertinent by himself, or required by any of the parties to be so stated.

A copy,—Teste :

B. T., Clerk.

COMMISSIONER'S NOTICE.

*Commissioner's Office, C—, — day of —, 18—.*

The parties interested in the decree from which the foregoing is an extract, will take notice that, on the — day of —, in the year —, at my office, in the town of C—, I shall proceed to execute the same, when and where they are required to attend, with such books, papers, vouchers, and evidence as will enable me to comply with the said order of the court.

M. G.,

Master-Commissioner of the said court.

The *formula* for the statement follows on the pages following.

Dr.

*The Estate of Thomas Hart, deceased, in account with*

		Principal.	Interest.
1870.			
Sept. 1,	To cash paid H. C. C. Att'y's fee, per voucher, (1)	\$15 00	
	" cash paid Clerk's fees, &c., " (2)	11 24	
" 17,	" cash paid Dr. T., medical acc't, " (3)	176 38	
Dec. 20,	" cash paid for sundries, " (4)	361 25	
" 25,	" cash paid A. D., amount of bond, " (5)	648 94	
1871.			
July 1,	" comm'n on rec'ts (\$18,955.91), 5 per ct.,--	947 79	
"	" balance due estate,-----	16,795 31	
		<u>\$18,955 91</u>	
1871. (a)			
Aug. 17,	To cash paid W. P.'s account, per voucher, (6)	32 75	
" 24,	" cash paid B. L., am't of bond, " (7)	5,364 89	
Oct. 10,	" cash paid R. V. B.'s judgment, " (8)	7,670 12	
1872.			
Mar. 6,	" cash paid S. N., note, " (9)	135 65	
July 1,	" comm'n on rec'pts (\$1,964.30), 5 per ct.,--	98 20	
"	" balance due estate,-----	5,458 09	\$1,007 70
		<u>\$18,759 61</u>	<u>\$1,007 70</u>
1873. (b)			
Jan. 6,	To c'h p'd T.R., his b'd on dec'd, pr. vouch'r, (10)	11,815 98	
"	" c'h p'd T.P., undertaker's charges, " (11)	98 50	
July 1,	" comm'n on rec'pts, (\$2,712.02), 5 per ct.,--	135 60	
		<u>\$12,050 08</u>	
1873. (c)			
July 2,	To balance <i>per contra</i> -----	3,552 53	
Aug. 20,	" cash E. E., bond, per voucher,----- (12)	1,634 75	
Sept. 30,	" cash paid W. L., bond, "----- (13)	7,650 68	
1874.			
July 1,	" interest one year on balance of last year,--	218 15	
"	" comm'n on rec'pts (\$8,989.06), 5 per ct.,--	449 45	
		<u>\$13,500 56</u>	
1874. (d)			
July 2,	To balance <i>per contra</i> of last year,-----	4,611 50	
1875.			
July 1,	" interest one year, on balance of last year,--	270 69	
"	" comm'n on rec'pts (\$8,000), 5 per cent,--	400 00	
"	" balance due estate,-----	2,817 81	
		<u>\$8,000 00</u>	
1876. (a)			
July 2,	To comm'n on rec'pts (\$8,647.38), 5 per ct.,--	432 35	
"	" balance due estate,-----	11,032 79	\$169 08
		<u>\$11,465 14</u>	<u>\$169 08</u>

*Jane Hart, his Administratrix with the Will Annexed.*

Cr.

1870.		Principal.	Interest.
Aug. 18,	By cash for crop of wheat sold,-----	\$1,200 00	
Dec. 31,	" cash received at sale of decedent's effects,--	489 65	
"	" cash proceeds of corn and other crops,-----	788 50	
1871.			
July 1,	" amount of sale-bill due this day,-----	16,582 76	
		\$18,955 91	
1871.			
July 2,	By balance <i>per contra</i> ,-----	16,795 81	
Aug. 5,	" amount received of judgment against Gray,--	1,200 17	
Sept. 9,	" amount of bond of J. H. S.,-----	764 18	
1872.			
July 1,	" interest one year on balance of last year,--		\$1,007 70
		\$18,759 61	\$1,007 70
1872.			
July 2,	By balance <i>per contra</i> of principal,-----	5,458 00	
Oct. 8,	" amount received on judgment against H. D.,--	1,704 32	
1873.			
July 1,	" int. bal. of last year, to meet disbursements,--	1,007 70	
	" int. one yr., on bal. of last yr., to meet "	327 48	
	" balance due administratrix, c. t. a.,-----	3,532 58	
		\$12,060 08	
1873.			
Nov. 1,	By cash of M. L., in full of bond,-----	4,288 89	
Dec. 30,	" cash of E. K., in full of bond,-----	4,755 17	
1874.			
July 1,	" balance due administratrix, c. t. a.,-----	4,511 80	
		\$13,500 56	
1874.			
Dec. 4,	By cash of D. O. on bond,-----	1,000 00	
1875.			
May 5,	" cash of same, in full of bond,-----	7,000 00	
		\$8,000 00	
1875.			
July 2,	By balance <i>per contra</i> of last year,-----	2,817 81	
1876.			
Mar. 6,	" cash of M. P. on bond,-----	8,647 88	
July 1,	" interest one year, on balance of last year,--		\$169 08
		\$11,465 14	\$169 08
1876.			
July 2,	By balance due <i>per contra</i> , Principal,-----	11,032 79	
	Interest,-----	169 08	
	Balance due estate July 2, 1876,-----	11,201 87	
	Int. on \$11,032.79 from July 2, 1876 till paid, (d).		

NOTES.—(a). In the years marked (a), a balance being due to the estate, the interest on that balance for the year is calculated, but kept in a separate column; and all the disbursements are applied *exclusively* to sink the principal before any portion is appropriated to discharge the interest.

(b). In the year marked (b), the disbursements exceeding the receipts of the current year, together with the balance of principal of the preceding year, the interest-balance of former years, as well as the interest on the balance of the preceding year, are aggregated with the principal, in order to meet the disbursements, which being still in excess, the balance shifts to be in favor of the administratrix, on which she is allowed interest in the next year.

(c). In the years marked (c), the administratrix being in advance, is allowed interest as the estate was; but that interest is aggregated with the principal, as in the case of an ordinary creditor, so that the receipts of the estate go to liquidate the interest before any part is applied to the principal. (3 Leigh 834; Matt. Comm'rs 122, 125.)

(d). At the close of the administration account the interest due from the personal representative is not to bear interest, unless, perhaps, under very peculiar circumstances. (Morris v. Morris, 4 Grat. 294; Peale v. Hickie, 9 Grat. 437; Matt. Comm'rs 125.)

### 3<sup>d</sup>. Exceptions to the Report of the Commissioner, and the *Re-commitment* thereof.

In the Virginia courts, the commissioner's report does not stand confirmed as a matter of course. It is confirmed only by special order of court. In the United States courts, it stands confirmed after the lapse of a month. (Sands' Suit in Eq. 170; 1 Abb. U. S. Pr. 147.) Exceptions to a commissioner's report, which of course precede its confirmation, should be signed by counsel, and partake in some degree of the nature of special demurrers. The imputed error must be specifically and carefully indicated; and whatever in the report is not excepted to, must be understood as admitted to be correct *in principle and in fact*. (2 Rob. Pr. (1st ed.) 383; 2 Dan. Ch. Pr. 1492 & seq, 1497 & seq; Wilkes v. Rogers, 6 Johns. (N. Y.) 566, 591.) And if a general exception be taken, without specification, and the court finds the master right in any one independent particular, the exception must be overruled, (Green v. Weaver, 1 Sim. (2 Eng. Ch. R.) 434, & n (2); Pearson v. Knapp, 1 My. & K. (7 Eng. Ch. R.) 312; Moore v. Langford, 6 Sim. (9 Eng. Ch. R.) 327); just as at law, a demurrer to the whole declaration must be overruled, if any substantive part of it be good. (1 Chit. Pl. 703; *Ante*, p. 895.)

The consequence of omitting to file an exception to the commissioner's report is that in an *appellate court*, the report cannot be impeached in relation to matters which may be affected by extraneous testimony; as for example, the allowance or denial of interest in the settlement of the accounts of an executor or adminis-

trator; because had an exception been presented, such extrinsic testimony might have been produced to repel it. And so, for a like reason in part, an exception ought not to be allowed, even in the court below, when it was not submitted until the court had pronounced its decree, notwithstanding there had been ample opportunity for the purpose, the report having been on file for several years. (*Beckwith v. Butler*, 1 Wash. 224; *Jones v. Watson*, 3 Call. 258; *White v. Johnson*, 2 Munf. 285; *Perkins v. Saunders*, 2 H. & M. 422; *Wills v. Dunn*, 5 Grat. 384, 412; *Miller v. Holcombe*, 9 Grat. 665; *Mosby v. Mosby*, 9 Grat. 584; *Wilkes v. Rogers*, (N. Y.) 566, 592; *Meth. Ep. Ch. v. Jacques*, 3 Johns. Ch. R. (N. Y.) 137; *Slee v. Bloom*, 7 Johns. Ch. R. 137.) But where the report is erroneous *on its face*, although not specially excepted to prior to the hearing, it may be then objected to, or even though first brought forward in an appellate court. (*Walker v. Walke*, 2 Wash. 195; *White v. Johnson*, 2 Munf. 285; *Jones v. Watson*, 3 Call. 258; *Perkins v. Saunders*, 2 H. & M. 422; *Garrett v. Carr*, 3 Leigh, 413 & seq; *Wills v. Dunn*, 5 Grat. 384; *French v. Townes*, 10 Grat. 513; *Wilkes v. Rogers*, 6 Johns. 566, 592; *Meth. Ep. Ch. v. Jacques*, 3 Johns. Ch. R. 137; *Slee v. Bloom*, 7 Johns. Ch. R. 137.)

Where the *exceptions are sustained*, it will often be necessary, in order to attain the justice of the case, to *re-commit* the cause to the commissioner, either to take further testimony, to re-state the accounts, or otherwise to bring before the court more perfect materials for its determination. Thus, where on a general order of reference of *all accounts* between the parties, the commissioner states an account as to *one subject only*, omitting others, the report should be re-committed; and if such a report were confirmed by the court below, it must be reversed in an appellate court. (*Harris v. Magee*, 3 Call. 502.) And so where the exception is sustained on the ground of an allowance of a demand upon insufficient testimony, it is the proper practice not to pronounce a final decree, but to *re-commit the report* to the commissioner for further evidence and inquiry; for the opposite party, in whose favor the commissioner reports, may perchance have forborne to introduce further evidence although it was in his power, in consequence of the commissioner being prematurely satisfied. (*Williams v. Donaghue*, 1 Rand. 300.) In like manner, if in a suit by distributees against a personal representative, upon a reference of the accounts, the commis-

sioner returns his report before the defendant's testimony is filed, and the delay is sufficiently excused, there should be a *re-commitment* of the report. Notwithstanding the testimony *may seem* amply to sustain the defendant in the controversy, it would be improper to dismiss the bill, for the plaintiff is entitled to an opportunity to disprove the testimony, and to a statement of the account in the light of all the evidence in the cause. (Thomas v. Dawson, 9 Grat. 531.)

In general, the *re-commitment* of an account to a commissioner must be in order to prosecute an inquiry upon some point *put in issue by the pleadings*; but where the evidence taken before the commissioner, upon the first reference, discloses an immoral transaction, (e. g., a gambling partnership,) as the probable basis of the cause, it is proper to *re-commit* the account, in order to ascertain definitely whether the consideration of the demands set up by the parties mutually is in fact tainted with the suspected illegality. (Watson v. Fletcher, 7 Grat. 1, 19.)

Where a commissioner's report is too vague, stating results—as for instance, that an examination is *impertinent*—but setting forth no particulars, a re-commitment is proper, in order that it may be made to appear *in what respects* he considered it impertinent. (2 Dan. Ch. Pr. 1501; Anon. 3 Mad. (A. n. ed.) 132; Matt. Commis'rs, 149.) And in some instances, even after the report is confirmed, it has been re-committed, when the justice of the case plainly requires it, although it seems only in cases of fraud, surprise, or mistake. (2 Dan. Ch. Pr. 1501-'2, 1416; Matt. Commis'rs, 149; Cockran v. Lynch, 1 Bail. Eq. (So. Car.) 514.)

#### SECTION VI.

##### *Re-Hearings, and Bills of Review.*

##### 6<sup>d</sup>. Re-Hearings, and Bills of Review.

Where a party feels aggrieved by a decree of the court of chancery, there are three modes by which he may have it altered or reversed, namely, by (1), A re-hearing before the same court; (2), A bill of review, also in the same court; and (3), An appeal to an appellate court. We are now to treat of the doctrines applicable to *re-hearings* and *bills of review*—*re-hearings*, which relate solely to *interlocutory* decrees, and *bills of review*, which are exclusively concerned with decrees *final*;

W. C.

##### 1<sup>o</sup>. Re-hearings.

We have seen, that a re-hearing is applicable only to an

*interlocutory*, and not to a *final* decree. After a final decree has been rendered, and the *term is ended*, the cause cannot be heard in the same court, except upon a *bill of review*, a proposition which holds even where the decree is final *as to but one* of several defendants, notwithstanding further proceedings may be ordered, or may be proper as to the others. But where the decree is *interlocutory*, what is styled by the party a bill of review may be treated as a petition for a *re-hearing*. (2 Rob. Pr. (1st ed.) 389; Hodges v. Davis, 4 H. & M. 400; Royall v. Johnson, 1 Rand. 421; Roberts v. Stanton, 2 Munf. 129; Laidley v. Merrifield, 7 Leigh, 346; Platt v. Howland, 10 Leigh, 507; Dunbar v. Woodcock, 10 Leigh, 629; Furman v. Coe, 1 Cai. Cas. (N. Y.) 96; Dunham v. Winans, 2 Pai. (N. Y.) 24.)

An interlocutory *order* or *decree* may be corrected by the court which made it, upon *motion* or *petition* for a re-hearing,—that is, upon *motion*, if the erroneous proceeding be an *order*, and upon *petition*, if it be a *decree*. (2 Rob. Pr. (1st ed.) 389; Banks v. Anderson, 2 H. & M. 20; Barger v. Buckland, 28 Grat. 870-'71; Fanning v. Durham, 4 Johns. Ch. R. (N. Y.) 35; Radley v. Shaver, 1 Johns. Ch. R. 200.)

To grant a *re-hearing* is in the sound discretion of the court, and it ought to be allowed only where, upon a candid review of the decree, there seems reason to doubt its correctness, (as in consequence of the discovery of new and important testimony not known or accessible before, or the like), and not merely because of the clamorous complaints of the unsuccessful party. Nor, when a re-hearing is accorded, is the cause open save only in the particulars indicated in the petition. (2 Rob. Pr. (1st ed.) 389-'90; Roberts v. Cocke, 1 Rand. 121; Field v. Schieffelin, 7 Johns. Ch. R. (N. Y.) 256; Land v. Wickham, 1 Pai. (N. Y.) 256; Consequa v. Fanning, 3 Johns. Ch. R. 594.)

It should be observed, that there is no statutory bar to the time within which a petition may be filed for the re-hearing of an interlocutory decree. A re-hearing has been ordered after eighteen and even twenty-five years, the whole question being remitted to the discretion of the court, upon all the circumstances of the case. (Cocke v. Gilpin, 1 Rob. 26, 42; Kendrick v. Whitney, 28 Grat. 651, &c.)

## 2°. Bills of Review.

The general character of a bill of review has been already stated. (*Ante*, p. 1136.) We are now to pursue the discussion further, as was there promised.



In order to warrant a bill of review, two things must concur, namely:

(1), That the decree which it seeks to review should be *final*; and

(2), That there should be either *error of law apparent on the decree*, or the discovery of *some new matter*, not known to the party at the time of the decree, nor with ordinary diligence discoverable by him.

(1), The Decree *must be Final*.

If the decree be *not final*, (and it must be understood that it is not properly a decree at all, until the end of the term at which it is pronounced, being until then *in fieri*, and in the breast of the court), the bill must be dismissed at the costs of the party filing it, at least as a *bill of review*; but it has sometimes been allowed to stand as a petition for a re-hearing. (Stor. Eq. Pl. § 634, a; 3 Dan. Ch. Pr. 1724, & n (1); Mitf. Eq. Pl. 81-'2; Ellzey v. Lane, 2 H. & M. 589; Mackey v. Bell, 2 Munf. 523; Whiting v. Bank of U. States, 13 Pet. 6, 13; Laidley v. Merrifield, 7 Leigh, 346.)

(2), There must be either *error in law, apparent on the face of the decree*, or *new matter* subsequently discovered, and with due diligence *not discoverable before*.

See Stor. Eq. Pl. § 404 & seq, 407 & seq; 3 Dan. Ch. Pr. 1727; 2 Rob. Pr. (1st ed.) 414; Triplett v. Wilson, 6 Call. 47; McCall v. Graham, 1 H. & M. 13; Ellzey v. Lane, 2 H. & M. 593; Winston v. Johnson, 2 Munf. 305; Hill v. Bowyer, 18 Grat. 375; Carter v. Allen, 21 Grat. 245; Wiser v. Blackly, 2 Johns. Ch. R. (N. Y.) 491; Lansing v. Albany, Ins. Co., 1 Hopk. C. R. (N. Y. 102; Buffington v. Harvey, 5 Otto, 99; Thompson v. Maxwell, 5 Otto, 397.

The error in law must be *apparent on the face of the decree*. Hence, no bill of review lies because of an omission to prepare the cause for hearing, in a particular not needful to be stated in the decree. But where a decree was rendered against an *infant defendant*, without any answer from him, or even taking the bill for confessed as to him, it is a proper case for a bill of review. (3 Dan. Ch. Pr. 1727-'8 & n (3); Quarrier v. Carter, 4 H. & M. 242; Braxton v. Lee, 4 H. & M. 376.)

*Forgetfulness or negligence* of parties who labor under no incapacity, is not a foundation for a bill of review as to them, (Ellzey v. Lane, 2 H. & M. 593); nor is the *mistake* of counsel in omitting to insist upon a point, however vital, (Triplett v. Wilson, 6 Call. 47); nor that documents designed to be filed with the bill were *lost or mislaid by counsel*, and not found until after the adverse de-

cree, (*Jones v. Pilcher*, 6 Munf. 425); nor that the party was prevented by *wrong legal advice*, from taking testimony to prove important facts, (*Franklin v. Wilkinson*, 3 Munf. 112); nor that the commissioner's report was made up *without due notice*, or that it did not lie in the clerk's office as much as ten days before decree, there being no exception in either case, (*Winston v. Johnson*, 2 Munf. 305); nor that the decree states a fact *as proved*, as to which there was *no proof*, or otherwise errs in deciding a question of fact upon the proofs exhibited, 3 Dan. Ch. Pr. 1727-'8 & n (12); *Barnett v. Smith*, 5 Call. 102; *Webb v. Pell*, 3 Pai. (N. Y.) 368); nor that the cause was determined in the unavoidable absence of counsel, which was not known to the party until after the decree. (*Quarrier v. Carter*, 4 H. & M. 242; *Franklin v. Wilkinson*, 3 Munf. 112.)

As to what is *apparent error*, it is such error as where a decree adjudges good a limitation of a chattel after an *indefinite failure* of issue, (*Williamson v. Ledbetter*, 2 Munf. 521); or where, (apart from the statute in Virginia,) no day in court is *allowed an infant* after attaining age, to show cause against it, or where a decree is rendered against an infant defendant, *without an answer*, or without proper proceedings against him. (Mitf. Eq. Pl. 78; *Quarrier v. Carter*, 4 H. & M. 242; *Braxton v. Lee*, 4 H. & M. 376; *Lee v. Braxton*, 5 Call. 459.)

Affirmation of a decree by the court of appeals precludes a bill of review for any error of law *apparent on the face of the record*, (*Campbell v. Price*, 3 Munf. 227; *McCall v. Graham*, 1 H. & M. 15; *Randolph v. Randolph*, 1 H. & M. 184, 199, 200; *Campbell v. Campbell*, 22 Grat. 673-'4); but not, it seems, for *new matter subsequently discovered*. (Mitf. Eq. Pl. 79; *Randolph v. Randolph*, 1 H. & M. 184, 199, 200; *Campbell v. Price*, 3 Munf. 227; *Campbell v. Campbell*, 22 Grat. 674-'5.)

No previous leave of court is requisite in order to file a bill of review for *error of law apparent on the face* of the proceedings; but when it is desired to file such bill *by reason of new matter*, such previous leave is indispensable. (Mitf. Eq. Pl. 78-'9; 3 Dan. Ch. Pr. 1729-'30 & n (2), 1732-'3 & n (1).)

In order that a bill of review shall be allowed for *new matter*, it must appear to have been *discovered since the decree*, and to be such as could not *with reasonable diligence* have been known before, and must, moreover, be *material* to the merits of the case. (2 Rob. Pr. (1st ed.) 416; Stor. Eq. Pl. § 412 & seq; *Barnett v. Smith*, 5 Call. 98; *Carter v. Allen*, 21 Grat. 245; *Campbell v. Campbell*, 22 Grat. 674-'5; *Livingston v. Hubbs*, 3 Johns. Ch. R. (N. Y.) 124

Lansing v. Albany Ins. Co., 1 Hopk. Ch. R. (N. Y.) 102; Pendleton v. Fay, 3 Pai. (N. Y.) 206; Ord v. Noel, 6 Madd. Ch. R. (Am. ed.) 86; Bingham v. Dawson, Jac. (4 Eng. Ch. R.) 243.)

A bill of review can be filed only by one who *has an interest in the question* it presents, and who will be benefited by the reversal or modification of the former decree, and by none but *parties and privies*, and not by assignees of the parties. (Webb v. Pell, 3 Pai. (N. Y.) 368; Dyckman v. Kernochan, 2 Pai. 26; Wiser v. Blackley, 2 Johns. Ch. R. (N. Y.) 492; Thompson v. Maxwell, 5 Otto, (95 U. S.) 397.)

As to the limitation to a bill of review in point of time, it is at common law, and independently of statute, by analogy to writs of error; *twenty* years, and when these latter writs were by statute limited to *five* years, bills of review followed the same analogy, and were also limited by the same period. But by act of February 11, 1814, a limitation was prescribed which yet prevails, of *three years* next after the decree, saving to an *infant, feme covert or insane person*, a like time after the removal of his or her disability. (2 Rob. Pr. (1st ed.) 417; Stor. Eq. Pl. § 410; Thomas v. Harvie, 10 Wheat. 146; Sheppard v. Larue, 6 Munf. 530; Smith v. Clay, 2 Ambl. 647; S. C. 3 Bro. C. C. 639, note; V. C. 1873, c. 175, § 5.) It ought to appear from the bill itself, that it is within the prescribed period, or covered by some of the savings of the statute; at least if it be for errors apparent on the *face of the record*. (Stor. Eq. Pl. § 410; Lytton v. Lytton, 4 Bro. C. C. 458; Thomas v. Harvie, 10 Wheat. 146.)

#### SECTION vii.

##### *Proceedings in Chancery by way of Appeal.*

##### 7<sup>a</sup>. Proceedings by way of Appeal.

The proceedings by way of appeal have been so fully expounded in connection with the action at law, (*Ante*, p. 846 & seq.) that it is deemed needless to repeat here the explanation there given, which the reader is advised now to re-peruse, however familiar with it he may suppose himself to be. It will be desirable also to read again just here, what was formerly said of the appellate jurisdiction of the Supreme court of the United States, in respect to both the Federal and State courts, and the modes whereby that appellate cognizance is exercised. (*Ante*, p. 280 & seq, 294 & seq.)

## DIVISION VII.

## THE PURSUIT OF REMEDIES BY PROCEEDINGS IN COURTS OF ADMIRALTY.

## VII. The Pursuit of Remedies by Proceedings in Courts of Admiralty.

A brief abstract of the doctrines connected with the pursuit of remedies by proceedings in courts of admiralty is all that can now be essayed. Such an abstract, analytically arranged, though it may of itself convey but little knowledge to the reader, will indicate to him the sources whence he may derive fuller information, and will also enable him to digest what he thus acquires, under proper heads, and thereby to learn it with more facility and thoroughness, to retain it more tenaciously in memory, and to apply it more readily in practice.

We have seen in another place that admiralty and maritime jurisdiction is by the United States Constitution conferred *exclusively* upon the Federal judiciary, and that Congress has assigned the *civil* part of it, so far as *original* cognizance is concerned, *exclusively* to the *district courts* of the United States. (U. S. Const. Art. III § 1; *Ante* p. 232, 249, 319, &c.) But, as we have also seen elsewhere, the United States Circuit Courts have, in general, *appellate* cognizance of this class of causes from the district courts, and the Supreme Court of the United States, from the circuit courts. (*Ante*, p. 276, 281, 284-'5.)

Let us therefore take notice of (1), The pursuit of remedies in admiralty by original proceedings; and (2), The pursuit of remedies in admiralty by appellate proceedings;

W. C.

## CHAPTER I.

1<sup>a</sup>. The Pursuit of Remedies in Admiralty by *Original Proceedings*.

In discussing *original* proceedings in admiralty, we must discriminate between (1), Criminal cases; and (2), Civil cases;

1<sup>b</sup>. Original Proceedings in Admiralty in Criminal Cases.

With respect to *offences not capital*, committed on the high seas, or on any navigable water, *not within the jurisdiction of any State*, Congress has bestowed a concurrent jurisdiction upon the district and circuit courts of the United States, in total exclusion of the State courts, (*Ante*, p. 249, 260; Rev. Stat. U. S., § 4339, & seq); and where such *offences are capital*, the cognizance of them belongs *exclusively* to the circuit courts of the United States. (*Ante*, p. 260.)

2<sup>b</sup>. Original Proceedings in Admiralty in Civil Cases.

The cognizance of *original* proceedings in admiralty in *civil cases* belongs by the laws of Congress, as we have seen, *exclusively* to the district courts, (*Ante*, p. 249, 319; Rev. Stats, U.

S. § 563; Governor of Georgia v. Madrazo, 1 Pet. 110); and we are now to inquire into the mode of prosecuting the remedies appointed by law for such cases. To that end we may advert to (1), The general character of admiralty proceedings; (2), The limitation thereto, in point of time; (3), The course of the regular proceedings; and (4), Certain independent and irregular proceedings sometimes resorted to;  
W. C.

#### SECTION. i.

##### 1°. The General Character of Admiralty Proceedings.

Admiralty proceedings are for the most part, especially in prize causes, modelled upon the civil or Roman law, and the courts which administer them boast that they habitually act upon enlarged principles of equity. (Ben. Adm. § 358; The Adeline, 9 Cr. 344; Sheppard v. Taylor, 5 Pet. 709; Oliver v. Alexander, 6 Pet. 146; The Virgin, 8 Pet. 550; The Tartar, 1 Hagg. Adm. 14; The Nelson, 1 Hagg. Adm. 176.)

Proceedings in admiralty are divided into two great classes, *in rem*, and *in personam*. Suits *in rem* are against a thing itself, and the relief is confined to the thing, and extends not to the person. Suits *in personam* are against a person, and the relief is against *him*, without reference to any specific property or thing. In some cases the proceedings *in rem* and *in personam* may be united in the same suit, for the attainment of more complete justice. (Ben. Adm. § 359, 361; 2 Pars. Ship. & Adm. 394, 496.)

A distinction is also to be noted between *possessory* and *petitory* suits; *possessory*, when the cause does not involve any question as to the *title* to the ship or other property, but only as to the *possession*, by reason of some maritime lien; and *petitory*, when the inquiry relates immediately to the *title* or ownership, as between rival claimants. Originally the court of Admiralty in England entertained jurisdiction of petitory as well as merely possessory actions. Since the Restoration, however (in 1660), that court, through the jealous interference of the courts of law, had ceased to pronounce upon questions of ownership or property, where the rights could be determined by the actions of *detinue* or *trover* in the common law courts, and had quietly abandoned petitory suits; and even in possessory actions where the question of mere property arose, especially of a more complicated nature, were accustomed to decline to adjudicate it. (2 Browne's Civ. & Adm. L. 430; The Aurora, 3 Rob. 136; The Warrior, 2 Dods. 288.) The ancient jurisdiction of the Admiralty was restored in England by the Statute 3 & 4 Vict. c. 65. In the United States, where the courts of admiralty have not been subjected to such jealous restraints, the ancient jurisdiction over petitory suits has been retained, and such actions are often employed,

in the case of ships especially. (Ward v. Peck. 18 How. 267-'8; New England Ins. Co. v. The Sarah Anne, 13 Pet. 387; The Tilton, 5 Mason 465; Grigg v. The Clarissa Anne, 2 Hughes, 89 & seq.) Accordingly, provision is made by the admiralty rules for the manner of proceeding with the process in certain cases, as well of petitory as possessory suits; as that in all petitory and possessory suits between part owners or adverse proprietors, or by the owners of a ship, or the majority thereof, against the master of a ship for the ascertainment of the title and delivery of the possession, or for the possession only, or by one or more part owners against the others to obtain security for the return of the ship from any voyage undertaken without their consent, or by one or more part owners against the others to obtain possession of the ship for any voyage, upon giving security for the safe return thereof, the process shall be by *an arrest of the ship*, and by a monition to the adverse party to appear and answer the suit. (Adm. Rules 20; Dist. Fed. Proc. 319-'20; 1 Abb. U. S. Pr. 151-'2.)

There are no established or necessary forms for pleadings, and other proceedings in admiralty. All that is required is that the matter should be distinctly and clearly propounded to the court. Experience shows, however, that the observance of well-framed and appropriate forms contribute essentially to promote certainty and intelligibility of statement, and to lessen the labor of both counsel and court. (Ben. Adm. § 371; 2 Abb. U. S. Pr. 73-'4; Pars. Ship. & Adm. 369; Dupont de Nemours & Co. v. Vance, 19 How. 171-'2 & seq; McKinlay v. Morrish, 21 How. 346-'7.)

#### SECTION ii.

##### 2°. The *Limitation in point of Time* to Proceedings in Admiralty.

There is *no statute of limitation* prescribing the time within which a suit in admiralty must be brought; but courts of admiralty govern themselves by the universal maxim, "*vigilantibus non dormientibus leges subveniunt*," and will not enforce stale demands, exercising a sound discretion in view of all the circumstances, whether the demand should be regarded as stale or not. (2 Pars. Ship. & Adm. 361; Ben. Adm. § 574 & seq.)

#### SECTION iii.

##### 3°. The Course of the *Regular Proceedings* in Admiralty.

See *Ante*, p. 309; 1 Abb. U. S. Pr. 149; 2 Do. 370.

The various steps to be dwelt upon in the prosecution of the regular proceedings in admiralty include, (1), The libel commencing the suit; (2), The process to convene the parties, and the proceedings therewith; (3), The pleadings after

the libel ; (4), Stipulation and bail of defendant ; (5) Proceedings in special cases, such as seaman's wages and prize causes ; (6), The hearing ; (7), The decree of the court ; and (8), The execution and proceedings thereon ;  
W. C.

SUB-SECTION i.

1<sup>a</sup>. The Libel commencing the Suit.

The libel, (from *libellus*, a little book,) answers to the *declaration* in the courts of common law, and to the *bill* in equity. The *filing* of the libel is the commencement of the suit. The libel should be signed by the party who files it, who is styled the *libellant*, and by his proctor, and verified by oath ; that is, supposing it to contemplate *the arrest* of the defendant. If it prays for only a citation or summons, without arrest, it need not be sworn to. The libel must be filed in the clerk's office whence the process is to issue, before such process can be had. (Ben. Adm. § 413, 372 ; Id. p. 497 & seq ; 2 Abb. U. S. Pr. 74, 370, &c. ; Adm. Rules 23 ; Adm. Rules Dist. Ct. E. Dist. Va. ; Rules 1 to 6 ; 2 Hughes' R. 566-'7 ; 2 Pars. Ship. & Adm. 368-'9.)

The libel is a statement of the case upon which the libellant, (who should be always the party *really entitled* to the relief sought,) founds his right to recover. The admiralty rules of the supreme court prescribe that it shall state the nature of the cause ; as for example, that it is a cause civil and maritime, of contract, or of tort or damage, or of salvage, or of possession, or otherwise, as the case may be ; and if the libel be *in rem*, that the property is within the district ; and if *in personam*, the names and occupations and places of residence of the parties. The libel is also required to propound and articulate in distinct articles the various allegations of fact upon which the libellant relies in support of his suit, so that the defendant may be enabled to answer distinctly and separately, the several matters contained in each article ; and it shall conclude with a prayer of due process to enforce his rights *in rem* or *in personam*, (as the case may require,) and for such relief and redress as the court is competent to give in the premises. And the libellant may further, in the conclusion, require the defendant to answer on oath, all interrogatories propounded by him touching the allegations in the libel. (Adm. Rules 23 ; Dest. Fed. Proced. 321.)

Hence the libel will contain the parts following :

- 1, The Address to the Court ;
- 2, A Statement of the names of the Parties ;
- 3, The general nature of the Demand ;
- 4, The facts which entitle the Party to Recover ;
- 5, A prayer for the proper Relief ;

6, A prayer for Process; and at the option of the Libellant;

7, A demand that the Defendant shall answer the interrogatories he propounds. (Ben. Adm. § 373 & seq, 412; 2 Pars. Ship. & Adm. 379 & seq; 2 Abb. U. S. Pr. 74 & seq; Adm. Rules Dist. Ct. E. Dist. Va., 1 to 10; 2 Hughes' R. 566 & seq.)

Along with the libel, according to the practice of some districts, must be filed, (except in suits by the United States), *security for costs*, which is usually given by what is called a *stipulation*, (an undertaking of record, acknowledged before the clerk, or the judge, or a United States commissioner), which may be under seal, but more frequently is not. The amount is determined, (as the requirement itself is,) by the rules which each district court makes for itself, and varies from \$100 in causes *in personam*, to \$250 in causes *in rem*. (Ben. Adm. 413 & seq; 2 Pars. Ship. & Adm. 417; Adm. Rules Dist. Ct. E. Dist. of Va. 15, 41, 42; 2 Hughes' R. 569, 575-'6.)

#### SUB-SECTION ii.

2<sup>d</sup>. The Mesne Process to Convene the Defendants, and the Proceedings therewith.

Under this head may be set forth, (1), The process itself; (2), The interlocutory sale, or delivery of the property; and (3), The return of the process;

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1<sup>o</sup>. The Mesne Process itself.

The process which summons the defendant to answer the libel is called *mesne process*, because it occurs *in the midst* of the proceedings, in contradistinction to *final process*, or execution, which comes *at the end* of the suit.

The court of admiralty is always open for the issuing and the return of process, although for the convenience of all concerned, the court by its own rules often appoints certain *general return days*, as for example, one particular day in every week. The process is issued by the clerk, in the name of the President of the United States, bearing *teste* by the judge, and under the seal of the court, and is directed to the United States marshal of the district, who or whose deputy must execute it, unless he is interested, when the court must appoint some fit person to serve it. (Ben. Adm. § 417 & seq.)

The process may be of several kinds, as, (1), A simple monition *in personam*; (2), A warrant of arrest *simply*; (3), A warrant of arrest, and also of attachment of defendant's goods; (4), A warrant *in rem*; and (5), Process *in personam* and *in rem*. They are to be executed severally, according to the exigency of their respective terms.



Thus, in case the process is a warrant of *arrest*, the defendant is to be arrested, but may give bail; and in case it be *an attachment of defendant's goods*, the goods attached are to be secured. If the process be *in rem*, the subject is to be taken into the custody of the officer, and kept safely, as it also is when the process is *in personam and in rem*. (Ben. Adm. § 420 & seq; *Manro v. Almeida*, 10 Wheat. 473; Rules 2 and 37 of Supreme Ct. of U. S.; 1 Abb. U. S. Pr. 149, 154; 2 Pars. Ship. & Adm. 388 & seq; Adm. Rules Dist. Ct. E. Dist. of Va. 11 & seq; 2 Hughes' R. 568 & seq.)

2°. The Interlocutory Sale, or Delivery of Property.

Where the property, whether a vessel or any other subject, is in its nature perishable, or liable to deterioration, the court may, in its discretion, on the application of either party, order it to be sold, and the proceeds, or a sufficient portion thereof to secure the satisfaction of the decree, to be brought into court to abide the event of the suit. Or, instead of a sale, the court, on the application of the claimant, may order the property to be appraised, and to be delivered to the claimant on his depositing in court so much money as the court shall direct, or on his giving a stipulation with sureties in such sum as the court shall prescribe, to pay the money awarded, or to abide the final decree in the cause. These orders may be made as well in vacation as in term, and the proceeds of the sale, the money deposited, or the stipulation, are a substitute for the thing itself, and may be treated by the court as the property might be, being subject to all the claims and liens which attach to that. (Ben. Adm. § 444; 1 Abb. U. S. Pr. 150; Adm. Rule 10; *Dest. Fed. Proc.* 316; *Jennings v. Carson*, 4 Cr. 25-'6; *The Para*, 19 Wheat. 497; *The Palmyra*, 12 Wheat. 1; *The Virgin*, 8 Pet. 538; *Houseman v. The N. Carolina*, 15 Pet. 40; *Schuchardt v. The Angelique*, 19 How. 239.)

Such applications for interlocutory or provisional relief may be made at any time after the commencement of the suit, and before the decree, and as often and whenever the circumstances may require such relief, at chambers as well as in open court, in vacation as well as in term. It must be observed, however, that no one can apply to the court in relation to the proceedings unless, by a claim or some stipulation or other regular proceeding, he first acquire an acknowledged legal relation to the cause. (*Bogart v. The John Jay*, 17 How. 399; *Schuchardt v. The Angelique*, 19 How. 24.) Usually the sale or the delivery of property is so much a matter of mutual convenience and advantage, as to induce the parties readily to assent to the proper

order. But where such assent is withheld, the applicant must cause his claim to be sworn to before a United States judge, clerk, commissioner, or a notary, and file it, giving a stipulation for costs, and then upon an affidavit, sworn to in like manner, setting forth the circumstances which are supposed to justify the desired action, and a service of a copy of such affidavit, with due notice of the motion, the application may be made. (Ben. Adm. § 448 ; Id. App'x, p. 508.)

3°. Return of the Process, with Defendant's Default, or his Appearance.

In admiralty the process is returned in open court, and the defendant, if the suit be *in personam*, is called, not on three several days, as by the English practice, but once for all; and if he fail to appear in person or by proctor, the court pronounces him in default, adjudges the libel to be taken *pro confesso*, and proceeds to hear the cause *ex-parte*, and to make such decree as law and justice shall require. This *ex-parte* hearing may take place at the time of default, or at any future day in court, as the court shall direct. But the more usual course, when the libel is thus taken for confessed, is to refer the matter to a commissioner to hear the parties, and report thereon to the court. (Ben. Adm. § 449 ; Adm. Rules, 29, 44 ; 1 Abb. U. S. Pr. 153, 155 ; Dest. Fed. Proc. 223, 328.)

But the court may, in its discretion, set aside the default, and upon the application of the defendant admit him to answer the libel at any time before the final decree, upon his payment of all the costs of the suit up to that time. (Adm. Rules, 29 ; 1 Abb. U. S. Pr. 153 ; Dest. Fed. Proc. 323.) And so also, even after final decree by default, the court in its discretion may, upon motion of the defendant and the payment of costs, rescind the decree, and grant a re-hearing within ten days after the decree has been entered, the defendant submitting to such further orders and terms in the premises as the court may direct. (Adm. Rules, 40 ; 1 Abb. U. S. Pr. 155 ; Dest. Fed. Proc. 327.)

Where the suit is *in rem*, upon the return of the process, upon motion of the libellant's proctor, proclamation is made by the crier for all persons desiring to oppose the condemnation and sale of the property according to the prayer of the libel, to come forward and make their allegations in that behalf. And if no one appears, on like motion the default is recorded, and a sentence of condemnation and sale is made, and the suit proceeds to a final hearing and decree then, or at some future day, or the court may refer the matter to a commissioner, to ascertain the

amount and report it to the court. (Adm. Rules, 44; 1 Abb. U. S. Pr. 155; Ben. Adm. § 452.)

It is manifest that where there are several defendants, or several things proceeded against in the same suit, there may be a decree by default against some, and an appearance by others; and in that event any party who has appeared is not prejudiced by the judgment by default against others, though as to these latter it may be absolute, and lead to final judgment and execution; but the party appearing is at liberty to controvert facts which, as to all others, may be *res adjudicata* by force of the default and final decree. (Ben. Adm. § 452 a; The Mary, 9 Cr 126, 142-'3.)

Wherever the court shall deem it expedient, or necessary for the purposes of justice, it may refer any matters arising in the progress of the suit to one or more commissioners, to be appointed by the court, to hear the parties and make report thereon. And such commissioners possess all the powers in the premises which are usually given to, and exercised by masters in chancery in references to them, including the power to administer oaths to, and examine the parties and witnesses touching the premises. (Adm. Rules 44; 1 Abb. U. S. Pr. 155.) And although it is not usual to refer to such a commissioner matters of tort, or uncertain damages, or mere questions of law, where the judgment of the court would be better informed by the actual hearing of the controversy, yet there is no legal objection to a reference in such case, and it is sometimes done. (Ben. Adm. § 453.)

In cases of seizure, when no one appears, the decree of condemnation is absolute, the only question being whether the property is forfeited or not; and it is usual for the district attorney, on his motion for condemnation, to state briefly the substance of the libel, and the cause of forfeiture. (Ben. Adm. § 454.)

Thus much for the case of default on the part of the *defendant*. But the *plaintiff* may be in like manner in default. And if at the return-day of the process, or at any other time, the libellant shall not appear and prosecute his suit according to the course and order of the court, (the defendant having appeared,) he shall be deemed in default and contumacy, and the court may, upon the application of the defendant, pronounce the suit *to be deserted*, and the same may be dismissed with costs. (Adm. Rules 39; 1 Abb. U. S. Pr. 155; Dest. Fed. Proc. 327.)

If the libellant appear on the return of the process, and move for the usual proclamation, the defendant must then appear, put in his answer to the libel, if *in personam*, and if *in rem*, his claim and answer, or on motion obtain from

the court such further time as may be necessary, which, in general, is readily accorded, if a real defence appear to be contemplated, (Ben. Adm. § 456); especially where the proceeding is *in personam*, because in such cases the defendant is often arrested but a short time before the return of the process. In proceedings *in rem*, it is less essential, because the process must usually be served fourteen days before the return-day, and in many cases more. But whenever further time is necessary, it is usually granted, accompanied, however, by an order that the defendant shall be in *contumacy and default*, unless the answer is put in within the further time. And as the further time is, in fact, an extension of the return-day of the process, the defendant, at the expiration of such further time, may take any course which he might have taken on the actual return-day, had he then been ready. (Ben. Adm. § 457.)

It is usual to say that *appearance* waives *formal* objections, but the appearance intended is not the mere entry of appearance by the defendant's proctor, but that which is effected by signing the necessary stipulations, and putting in the necessary answer. Before the appearance is thus perfected, any question touching the formality of the proceedings thus far should be submitted to the court for determination. (Ben. Adm. § 458.)

The ancient practice of requiring proctors in all cases to exhibit a *proxy*, or authority to represent their clients in the suit, has for two hundred years past been dispensed with; but a proctor must still be prepared to show such authority when required by the court. (Ben. Adm. § 458;) a practice which resembles that prevailing in our common law courts, touching a *warrant of attorney*, (*Ante*, p. 171); although in England such warrant is still rigorously required to be filed in every case before final judgment. (1-Tidd's Pr. 95.)

The *garnishee*, or person in possession of the property attached, upon being served with the citation or monition, must, like the principal defendant, appear in person or by proctor on the return day of the monition, and answer *in writing*, on oath, as to the property, credits and effects of the defendant in his hands, and to such interrogatories touching the same as the libellant may propound, either with the libel or afterwards. If he refuses or neglects thus to answer, he may be compelled to do so; and if he answers admitting any debts, credits or effects, he must keep the same to answer the exigency of the suit, and will be held personally liable for the libellant's demand, to the extent of their value; whilst if he denies having anything, the question is to be tried by the court like any other issue. (Ben.

Adm. § 459; Adm. Rules 37; 1 Abb. U. S. Pr. 154; Dest. Fed. Proc. 326; *Manro v. Almeida*, 10 Wheat. 473.)

If a third person's property be attached, he may intervene by claim for its protection. (Ben. Adm. § 459.)

In the original suit, when the defendant has not been served personally, but his property or credits have been attached to compel an appearance on the return of the warrant, the defendant is called as if he had been served personally, and not appearing, he is pronounced in contumacy and default, the libel is taken *pro confesso* against him, the amount ascertained, and the decree perfected as in other cases. And execution may issue against his person and property generally, and especially against his property, credits and effects in the hands of the garnishee, who will be compelled to apply them accordingly. (Ben. Adm. § 460, 426.)

No one can intervene in a suit or proceedings *in rem* unless he gives a *stipulation*, or undertaking, with sureties, to abide by the final decree in the cause, and to pay such costs, expenses, and damages as shall be awarded by the court upon the final decree, whether in the original or appellate court. And although in practice, and indeed by the terms of the rule, the stipulation is not put in until the time of filing the claim, answer, or allegation, yet in strictness no party may occasion delay or expense to the libellant till he has given the necessary security. (Ben. Adm. § 460; Adm. Rules, 34; 1 Abb. U. S. Pr. 154; Dest. Fed. Proc. 325.)

#### SUB-SECTION iii.

#### 3<sup>d</sup>. The Pleadings after the Libel.

The pleadings which follow the libel consist of (1), Pleadings on the part of the defendant; and (2), Amendments and supplemental pleadings on both sides;  
W. C.

#### 1<sup>o</sup>. Pleadings on the part of the Defendant.

The pleadings on the part of the defendant are, (1), The claim of property; (2), The exceptions to the libel; and (3), The answer to the libel;  
W. C.

#### 1<sup>st</sup>. The Claim of Property.

The claim of property is confined to proceedings *in rem*, in which alone there can be occasion to make such claim. It is a clear statement in proper and intelligible form, of the rights of the party making it to the subject attached; and any person concerned, whether by lien or by a more complete proprietorship, is entitled to make himself a party to the suit, in order thus to prefer his claim and defend his interests. No set form of words is prescribed.

It must set forth that the claimant is the true and *bona fide* owner, and that no other person is the owner thereof, and must be verified by affidavit. And if the claim be put in by an agent or consignee, he is also to make oath that he is duly authorized thereto by the owner; or if the property, at the time of the arrest, be in the possession of the master of a ship, that he is the lawful bailee thereof for the owner. And upon putting in such claim, the claimant shall file a stipulation, with sureties, in such sum as the court shall direct, (it is usually about \$250), for the payment of all costs and expenses which shall be awarded against him by the final decree of the court, or upon an appeal by the appellate court. (Adm. Rules, 26; 1 Abb. U. S. Pr. 153; Dest. Fed. Proc. 322; Ben. Adm. § 461.)

This claim may be put in immediately, without waiting for the return of the process.

Claimants of separate interests may appear separately, and put in separate claims,—as for separate shares of a ship,—for separate portions of the cargo, &c. But persons or officers, who appear by virtue of some general right, will not be allowed to receive property or money, unless the right of the principal to have it, and of the agent to represent him be proved to the court. (Ben. Adm. § 463; *The Bello Corrunes*, 6 Wheat. 152; *The Antelope*, 10 Wheat. 66; *The Vrouer Judith*, 1 Rob. Adm. 127, 129; *The Kinder's Kinder*, 2 Rob. Adm. 91-2; *The Rising Sun*, Id. 107-'8.)

Where there are several libels against the same subject, the claimant should put in his claim in each suit, as the libellants in each also should do, lest a decree of condemnation and sale by default in some one suit should finally dispose of the property without the power of redress. And in proper cases, suits may be consolidated. (Ben. Adm. § 464, 551.)

The merely putting in a claim is not a defence to the libellant's demand. The property may belong to the claimant, and still the libellant have full title to the relief sought; indeed, his right to that relief often depends upon the claimant being the owner of the property. The claimant must in all cases set forth the grounds of his defence, so that the court may be able clearly to apprehend them; and this may be done in a separate defensive allegation, or may be united with his answer, if one be required; for it is not needful to put in an answer unless one is called for by the libel. But whether an answer be prayed or not, the grounds of defence must in some form be exhibited, it being a primary rule in admiralty that the

cause must be heard and decided upon the *allegations* as well as the *proofs* in the cause. (Ben. Adm. § 465; Adm. Rules 34; 1 Abb. Adm. Pr. 154; Dest. Fed. Proc. 325; The Virgil, 2 W. Rob. 204; The Speed, Id. 227.)

2<sup>d</sup>. The Exceptions to the Libel.

The proper mode of presenting objections to any pleading or proceeding in admiralty is by *exceptions*, which in purpose and effect correspond in some cases with *demurrers*, in others with *pleas*, and yet in others, with *exceptions* to depositions, etc., in a court of law. Thus, if the libel, the answer, the replication, the interrogatories, or the answers to them, the report of the clerk, or commissioner, auditor, or assessor to whom any matter is referred, be liable to just objection, it may be excepted to, and if not so excepted to, the court will lend no indulgent ear to any objections at the hearing, to either its form or substance. Indeed, objections to mere matter of form are in no case viewed with favor; and if not made before answering in chief, or at the same time, will be considered as waived. (Ben. Adm. § 466.) In pursuance of these principles, it will be observed that exceptions to the libel may show, (1), That it was not signed either by the libellant or a proctor; (2), That it alleges no damages, or demands no specific debt; (3), That it is scandalous and impertinent; (4), That the demand asserted has been satisfied; or (5), That the cause of action has been released by the libellant, etc. And so exceptions by the libellant, to the answer to the articles and interrogatories in the libel, may relate to its sufficiency, fullness, distinctness or relevancy. (Ben. Adm. § 467-470; Adm. Rules 28, 36; 1 Abb. U. S. Pr. 153, 154; Dest. Fed. Proc. 323, 326.)

The exceptions ought to be numbered, and to set forth the objections intended to be presented, in the simplest and clearest manner. They are to be filed with the clerk without unreasonable delay, and notice given to the opposite party, who, before the exceptions are decided, may move to amend, or give notice that he *submits*, in which case an order will be entered, as of course, that the pleadings and proceedings be reformed in pursuance of the objection. (Ben. Adm. § 470.) If the exceptions are not submitted to, they are "*noticed for hearing*" by either party, and overruled or adjudged valid as to the court shall seem proper. And to those which are adjudged valid, the court orders the party to answer, within such time as it shall direct, and may further order him to pay such costs as it shall adjudge reasonable. It may also, by attachment, compel the defendant to make further answer

thereto, or may direct the matter of the exception to be taken *pro confesso* against the party, to the full purport and effect of the matter which it purports to answer, and as if no answer had been put in thereto. (Ben. Adm. § 470, 471; Adm. Rules, 29, 30; 1 Abb. U. S. Pr. 153; Dest. Fed. Proc. 323, 324; The Commander in chief, 1 Wal. 48 & seq; Miller v. U. States, 11 Wal. 301.)

### 3<sup>c</sup>. The Answer.

If the libel, whether it be *in rem* or *in personam*, prays for answer, an answer on oath must be filed, full, explicit, and distinct, to each separate article, numerically, and to each separate allegation of every article, and must also answer each interrogatory propounded; although where the sum or value in dispute does not exceed \$50 the rigor of these requirements may be relaxed in the discretion of the court. (Ben. Adm. § 472; Adm. Rules, 27, 49; 1 Abb. U. S. Pr. 153, 156; Dest. Fed. Proc. 323, 329.)

When the answer to an allegation or interrogatory would expose the defendant to a prosecution for a crime, or to any penalty or forfeiture, he may object for that reason to answer, but ought not to pass the allegation or interrogatory by in silence. If this objection covers the whole matter of the libel, he may *except* to the whole proceeding; otherwise his exception to a part may be united with his answer to the residue. (Ben. Adm. § 476; Adm. Rules, 31; 1 Abb. U. S. Pr. 153; Dest. Fed. Proc. 324.)

Either party may, at any time before the hearing, propose interrogatories to the other, subject to the exceptions above stated, and he is not compelled to annex them to his pleading, or to put them in with it, although such is the usual course. (Ben. Adm. § 477; Adm. Rules, 32; 1 Abb. U. S. Pr. 154; Dest. Fed. Proc. 324.) The answers, in all cases, are enforced by attachment, or else the subject-matter of the interrogatories may be taken *pro confesso* in favor of the propounder, as in the discretion of the court shall be deemed most promotive of justice. (Adm. Rules, 32, 29, 30; 1 Abb. U. S. Pr. 153-4; Dest. Fed. Proc. 323-4.) And if by reason of absence from the country, or of sickness or other casualty, either party is unable to answer at the proper time, the court in its discretion, in furtherance of justice, may dispense therewith, or may award a commission to take the answer as soon as practicable. (Adm. Rules, 33; 1 Abb. U. S. Pr. 154; Dest. Fed. Proc. 325.)

### 2<sup>e</sup>. The Replication and Subsequent Pleadings.

Prior to December, 1854, the practice, where the libel-



lant did not admit the statements of the answer, was to file a replication in a general form, and unsworn to, taking issue upon the answer. But by an admiralty rule of that term of the supreme court, it was provided that where the defendant in his answer alleged new facts, these shall be *considered* as denied by the libellant, and no replication, general or special, shall be allowed. But within such time as the court by general or special order shall direct, the libellant may *amend his libel* so as to confess and avoid, or explain, or add to the new matters set forth in the answer; and within such time as may be fixed in like manner, the defendant shall answer such amendments. (Adm. Rules, 51; 17 How. vi; 1 Abb. U. S. Pr. 156-7; Dest. Fed. Proc. 331.) The student will remember that this practice of amending the complainant's application for redress, instead of a special replication, prevails also in equity. (*Ante*, p. 1196.)

The abolition of the replication carries with it, it would seem, the abolition also of the subsequent alternate pleadings which formerly followed upon it, which were styled duplications, triplications, quadruplications, etc., which, however, have long been practically obsolete. (Ben. Adm. § 482.)

### 3°. Amendments and Supplemental Pleadings.

It accords with the genius of admiralty practice, to administer substantial justice between the parties without circuitry of action, and without allowing itself to be hindered by mere technicalities. Hence, it is declared by rule 24, that in all informations and libels, in causes of admiralty and maritime jurisdiction, amendments in matters of *form* may be made *at any time*, on motion to the court, *as of course*. And new counts may be filed, and amendments in matters of substance may be made, upon motion, at any time *before the final decree*, upon such terms as the court shall impose. And where any *defect of form* is set down by the defendant upon special exception, and is allowed, the court in granting leave to amend may impose terms upon the libellant. (Adm. Rules, 24; 1 Abb. U. S. Pr. 152; Dest. Fed. Proc. 321; *The Caroline v. U. States*, 7 Cr. 496; *The Adeline*, 9 Cr. 244; *The Edward*, 1 Wheat. 261; *The Divina Pastora*, 4 Wheat. 52; *Newell v. Norton*, 3 Wal. 257.) These amendments, however, cannot be made in the appellate court, so as to introduce a *new subject* of controversy; but when it appears to that court that they are requisite for the attainment of justice, the cause should be remanded to the court below, and the amendment be made there. (Ben. Adm. § 483; *The Adeline*, 9 Cr. 244; *The Anne v. U. States*, 7 Id. 570; *The*

Edward, 1 Wheat. 261; The Mariana Flora, 11 Wheat. 1; The Mary Anne, 8 Wheat. 380; The Palmyra, 12 Wheat. 1; Mandeville v. Wilson, 5 Cr. 15; Wright v. Hollingsworth, 1 Pet. 165; Houseman v. N. Car. 15 Pet. 40; The Mabey, 10 Wal. 419; S. C. 13 Wal. 738; The Western Metropolis, 12 Wal. 389.)

Before a pleading is answered, or the opposite party has taken any subsequent step in the cause, amendments may be made of course, without previous notice to the adversary, or application to the court. (Ben. Adm. § 484.)

Where one of the parties dies, and the cause of action survives to or against the co-parties, the suit does not abate any more than at common law, but a suggestion of the death is made on the record, and the suit proceeds in the name of the survivors. (Ben. Adm. § 484.)

Where a sole plaintiff or defendant dies before final sentence, and the cause of action survives, the personal representative of the decedent is the real party on that side, and may prosecute or defend the suit to final judgment; or such representative, if need be, may be summoned by *scire facias* to become a party. The personal representative, however, is always allowed a continuance until the next term, if he desires it, whilst the other party must show cause for one before it can be allowed. (Ben. Adm. § 484; 1 Abb. U. States Pr. 15; Wilson v. Codman, 3 Cr. 193.)

The whole case, substantially, of a party should be at once brought before the court, all the pleadings being conceived and expressed with due certainty, fullness and precision, and neither party being permitted to prove matter not put in issue by the pleadings; but the justice of the cause is not suffered to be defeated for want of supplemental and amended pleadings, which are to be filed whenever circumstances require it. (Ben. Adm. § 487-'88; Monsom v. Monsom, 3 Hagg. Ecc. R. 87; The Virgil, 2 Wm. Rob. 204; The Speed, Id. 227.)

#### SUB-SECTION IV.

#### 4<sup>d</sup>. Stipulation and Bail.

The proper mode of giving security or bail in admiralty is by what is denominated a *stipulation*, instead of the common law mode of bond or recognizance. No particular form of words is necessary to constitute a stipulation, so that there seems no reason to doubt that a bond or recognizance would suffice. The usual form recites the pendency of the suit, and distinctly assumes the obligation required. It is in general without seal, and should be acknowledged by the party before the court, the clerk, the judge at chambers, any author-

ized commissioner of the court, or any commissioner of the United States. (Adm. Rules, 5; 1 Abb. U. S. Pr. 149; Dest. Fed. Proc. 315; 13 Wal. xiv.) It is with sureties and in such form as the court shall direct. The security for its fulfilment may consist either of personal sureties, or of a deposit of money in the registry of the court. In the former case the sureties must swear to their responsibility over and above all debts, to twice the sum for which they undertake; and by exception to the sufficiency of the sureties and notice to the other party, they may be examined as to their property and responsibility before the court or a commissioner; whilst in the event of their insolvency or removal from the district pending the suit, new sureties may be required by order of court. (Ben. Adm. § 491, 492; Adm. Rules, 6, 10, 11; 1 Abb. U. S. Pr. 150; Dest. Fed. Proc. 315 & seq.)

Stipulations in the American admiralty, at present, are either (1), For costs and damages; (2), For the value of the subject-matter of controversy; or (3), To appear and comply with the decree of the court. They are in substance identical, but in form vary slightly according to the several purposes to which they are applied, in original and in appellate courts. (Ben. Adm. § 493; Adm. Rules, 3, 4, 10, 11, 25, 26, 34, 35; 1 Abb. U. S. Pr. 149, 150, 152, 153, 154; Dest. Fed. Proc. 314, 316, 317, 322, 325);

W. C.

1<sup>a</sup>. Stipulation for Costs, Expenses, &c., awarded against the Party.

The party required to give such stipulation may be either the libellant, the claimant, or any other person interested. The ancient rules of admiralty required the libellant in all cases to find sureties for the prosecution of his suit, for payment of defendant's costs, and for production of libellant's person as often as he might be called. But in England in modern times this is confined to non-residents. In the United States the practice is various, the admiralty rules of the supreme court containing no provision on the subject. It seems, however, to be understood that, on motion of the defendant, the court will always require of the libellant (where the suit is not for the United States,) a stipulation for costs, and to abide all orders of court, unless in case of inability (as in case of seamen suing *in rem* for their wages), when the court or judge may permit him to give what is called the *juratory caution*, that is, to enter into a stipulation without sureties, and to add to it his oath to appear as often as required. This *juratory caution* is allowed also in case of defendants, and is plainly analogous to the common law practice of suing or defending *in*

*forma pauperis*. (2 Pars. Ship. & Adm. 417; Ben. Adm. § 493, 502; *Ante*, p. 791, 792.)

By a rule of the district court for the Eastern District of Virginia, it is provided that seamen suing *in rem* for wages in their own right and for their own benefit, for services on board American vessels, and salvors coming into port in possession of the property libelled, shall not be required to give security for costs in *the first instance*. Although the court may afterwards require such security, for good cause shown. (Rule 42; 2 Hughes' R. 576.)

The claimant's stipulation is for the payment of all costs and expenses which shall be awarded against him by the final decree of the court, or upon appeal by the appellate court. (Adm. Rules 26; Dest. Fed. Proc. 322; 1 Abb. U. S. Pr. 153.)

In all cases of libel *in personam*, the court, upon the appearance of the defendant, where there has been no bail, nor attachment of property to answer the exigency of the suit, may, in its discretion, require the *defendant* to give a stipulation to pay all costs and expenses which shall be awarded against him in the suit by final or by interlocutory decree or order. (Adm. Rules, 25; 1 Abb. U. S. Pr. 152; Dest. Fed. Proc. 322.)

Third persons *intervening* for their own interests, are required, upon filing their allegations, to give a stipulation to satisfy the final decree in the cause, and to pay all such costs, expenses and damages as shall be awarded by the court upon the final decree, whether it is rendered in the original or appellate court. (Adm. Rules 34; 1 Abb. U. S. Pr. 154; Dest. Fed. Proc. 325.)

2°. Stipulation for the Value of the Subject-Matter of the Controversy.

Where the suit is *in rem*, the court may, upon the application of the claimant of the property, cause the ship or other chattels to be delivered to him, upon due appraisal, to be had under its direction, upon the claimant's depositing in court so much money as the court shall order, or upon his giving a stipulation to comply with the final decree of the court, whether original or appellate. (Adm. Rules, 10, 11; 1 Abb. U. S. Pr. 150; Dest. Fed. Proc. 316, 317.)

3°. Stipulation to Appear and Comply with the Decree of the Court.

This stipulation corresponds to what in the common law courts is known as *bail*, by which name also it is described in the Rules of Admiralty Practice. Stipulations of bail are allowed in suits *in personam*, either with the view to discharge the *person* from arrest, or the *property* from attachment.

The stipulation in both cases is that the defendant will appear and comply with all orders in the cause, interlocutory or final, whether in the original or in the appellate court. And upon such stipulation summary process of execution issues against the principal and sureties, in order to enforce the court's decree. (Adm. Rules, 3, 4; 1 Abb. U. S. Pr. 3, 4; Dest. Fed. Proc. 314.)

#### SUE-SECTION V.

##### 5<sup>d</sup>. Proceedings in Special Cases.

The *special cases* to which it is proposed to advert are, (1), Seamen's wages; and (2), Prize-causes; W. C.

##### 1<sup>o</sup>. Seamen's Wages

The demands of seamen for their wages have been always by all nations highly favored; and upon considerations at once of policy and justice, such demands constitute in the courts of admiralty, where alone they are cognizable, a lien upon the last plank of the ship. Accordingly, the acts of Congress have provided a cheap and summary mode of hearing controversies in relation to their wages, which are usually of small actual amount, but of great importance to the seamen. (Rev. Stats. U. S. § 4546; The Thomas Jefferson, 10 Wheat, 428; Ben. Adm. § 503; Pars. Ship. & Adm. 364, &c.)

A seaman is entitled to one-third of the wages then due, at every port where the vessel unloads her cargo before the voyage is ended, unless the contrary be expressly stipulated, and as soon as the voyage is ended and the cargo or ballast is discharged, at the last port of delivery, or a reasonable time for such discharge, say fifteen days, has elapsed, he is entitled to the whole residue in full, and he may proceed therefor in the admiralty, either *in rem* or *in personam*, or both; that is, against the ship and freight, or the ship, freight, and master, or against the owner or master. (Adm. Rules, 13; Dest. Fed. Proc. 318; Rev. Stats. U. S. § 4530, 4549; Sheppard v. Taylor, 5 Pet. 675; The St. Jago de Cuba, 9 Wheat. 409; The Steamboat Orleans v. Phoebus, 11 Pet. 175.) He may proceed immediately by suit *in personam*. But if he prefers to proceed *in rem*, that is, to subject the ship and cargo, or either, to the payment of wages, he must wait ten days after the discharge of cargo or ballast, or after time enough has elapsed for its discharge, (usually estimated at fifteen days,) before he commences his suit, unless, *first*, the vessel has left the port where the voyage ended without paying the wages; or *secondly*, is about to go to sea again before the end of the ten days; or *thirdly*, a dispute arises between the

master and seaman touching the wages, or *fourthly*, unless the seaman has been discharged by the owner or master; in all which cases the suit may be instituted immediately. In the first and second of these cases process to arrest the vessel may be awarded at the time the libel is filed; but in the third and fourth cases, before process to seize the vessel can be issued, there must be a preliminary inquiry before the district judge, or a United States commissioner, upon summons founded upon affidavit, or a libel, showing a *prima facie* right to sue, by either of those functionaries requiring the master to appear before him, and show cause why the vessel should not be seized. If the master fails to appear, or appearing, does not show that the wages are paid, or otherwise satisfied or forfeited, and if the matter is not forthwith settled, the judge or commissioner shall certify to the clerk of the district court that there is sufficient cause to issue admiralty process, and it shall be issued accordingly. (Rev. Stats. U. S. § 4530, 4546, 4547; 2 Pars. Adm. Pr. 364 & seq; Ben. Adm. § 504 & seq; Id. p. 559 & seq; 2 Abb. U. S. Pr. 397 & seq.)

All the seamen belonging to the same vessel, and having like cause of complaint, may join in the proceeding, by filing a petition stating their case, and annexing it to the original libel, without repeating the preliminary proceedings; and the suit goes on in their collective names to a decree. But their rights are entirely separate and independent. They are *co-libellants* by virtue of the indulgence extended to persons suing in the court of admiralty, but not *joint-libellants*, the contracts of the seamen being several, and they are therefore competent witnesses for each other. The case of each must be proved separately, and a separate decree pronounced for each. (Ben. Adm. § 506; 2 Pars. Ship. & Adm. 368; Adm. Rules E. Dist. of Va. 8, 9, 42, 52; 2 Hughes' R. 567, 576, 578; Oliver v. Alexander, 6 Pet. 145 & seq.)

## 2°. Prize Causes.

Prize is a creature of the sovereign power. No man has or can have any interest therein but what he takes as the mere gift of the sovereign, beyond the extent of which he has nothing. This principle is founded on irresistible reasons; for as the right of making war and peace is exclusively in the sovereign, the acquisitions of war must belong to him only, and the disposal of those acquisitions may be of the utmost importance for the purposes both of war and peace. *Bello parta cedunt reipublicæ*. (The El-sabe, 5 Rob. 181.)

It has been long established that before a maritime capture can completely vest in the captor, it must be con-

demned as lawful prize in a regular judicial proceeding, in a court belonging to the captor-belligerent, and sitting in his territory or that of his ally, the vessel itself being, as a general rule, required to be brought *infra præsidia* of the capturing country. The court in which this proceeding is had *may* be any that may be designated by the laws, but by the custom of nations it is the court of admiralty, and in this country it is the district court of the United States sitting in admiralty, which, in the absence of instructions from its own sovereign, is governed by the public law and practice of nations. (Ben. Adm. § 509; Id. p. 612 & seq; Letter of Sir W. Scott and Dr. Nicholl, 1 Rob. Adm. R. iv & seq; The Heinrich & Maria, 4 Rob. 54, 55; The Purissima Concepcion, 6 Rob. 46; L'Invincible, 1 Wheat. 238; The Estrella, 4 Wheat. 298; The Amiable Nancy, 3 Wheat. 546; Jecker v. Montgomery, 13 How. 516; The Amy Warwick, 2 Black, 635; The Nassau, 4 Wal. 640-'41 )

The admiralty court in England exercises this prize jurisdiction by virtue of a special commission from the crown. In all other cases that court is known as the *instance court*. With us the admiralty court administers both jurisdictions by virtue of Art. III, § ii, 1, of United States Constitution, conferring on the Federal judiciary cognizance of "all cases of admiralty and maritime jurisdiction," and of the Act of Congress in pursuance thereof, assigning such causes to the district courts exclusively, except in case of the confiscation of property employed in aid of insurrection against the United States when the circuit court has concurrent cognizance. (Rev. Stat. U. S. § 563 (cl. 8, 9); 629 (cl. 6); 5308; 5309.) And so diverse are these prize and instance jurisdictions that a case prosecuted in the court below exclusively as *prize*, cannot in the appellate court be treated as one on the *instance side*, for statutory forfeiture; nor *vice versa*, can a case treated below on the *instance side* of the court be regarded on appeal as *prize*; but in either case, if the facts disclosed on the record justify it, the cause should be remanded to the court below for a new libel and proper proceedings, according to the circumstances. (The Heppet, 7 Cr. 389; The Caroline, 7 Cr. 496; Jecker v. Montgomery, 13 How. 498; Mrs. Alexander's Cotton, 2 Wal. 404; U. S. v. Weed, 5. Wal. 67.)

Any district court of the United States may appoint prize commissioners, not exceeding three in number, who are officers of the court, and subject to its direction. They, or one of them, are to receive from the prize-master the documents and papers, and inventory thereof, and the af-

fidavit of the prize-master required by law; examine the witnesses on the standing interrogatories in the manner prescribed, make an inventory of the prize-property; and if it require immediate sale, notify the district attorney thereof; report anything as to the condition or custody of the property which may require action by the court; and seasonably return into court, sealed and secure from inspection, the documents and papers which shall come into their hands, duly scheduled and numbered, with the evidence they have taken and their inventory. (Rev. Stats. U. S. § 4621, 4622.)

It is a marked peculiarity of prize proceedings, that the evidence upon which the property must be condemned or restored, must, in the first instance, come wholly from the papers and cargo of the captured ship. The common law practice and rules of evidence have no relation to the subject. On this account, it is the duty of the captor to secure, take an inventory of, and preserve as evidence, all the papers on board the prize, and to bring in for examination the master, principal officers and some of the crew of the captured vessel; and further to insure that result, it is made the duty of the prize-master, who is despatched in command of the vessel, immediately upon his arrival in port, to deliver to a prize commissioner, the documents and papers, and the inventory thereof, and to make affidavit that they are the same, and in the same condition as delivered to him, or explaining any change of condition; to notify the district attorney of the capture; to deliver to the custody of the marshal the persons sent as witnesses, and to retain the custody of the prize, until taken from him by process from the prize court. It is then the duty of the prize commissioners, or one of them, to take the examinations of the principal officers and the seamen of the captured ship, sent in as witnesses by the captor, upon the *standing interrogatories*. These examinations, which are official and *ex parte*, and, therefore, admit of no cross-examination, are styled examinations "*in preparatorio*." The commissioners can use no other than the standing interrogatories, which are prepared and published by standing order of the court, and are sifting and thorough on all points which can affect the question of prize. The witnesses are not previously to see the interrogatories, documents or papers, or to consult with counsel, or with any persons interested, without special authority from the court, and are to be examined separately and apart, one from the other, in the presence of the agents of the parties, and in the presence of the commissioners, who must see that the proceedings are regular, and protect the witnesses.



from surprise or misrepresentation. And if a witness refuses to answer, or to answer fully, the commissioners must certify the fact to the court. It is also the duty of the commissioners to take the depositions *de bene esse* of the prize-crew and others, at the request of the district attorney, on interrogatories prescribed by the court. Each deposition is to be signed by the witness making it, and certified by the commissioners, or one of them; and they are then all sealed up and transmitted, along with the vessel's papers, to the proper district court. It is exclusively upon these papers, and the examinations above described, taken *in preparatorio*, that the cause is to be heard before the district court. If, from this evidence, the property appear *clearly* to be either a lawful subject of capture or not, condemnation or acquittal immediately follows. But if, on the other hand, the proofs taken *in preparatorio*, leave the question in doubt, or clouded with suspicions and inconsistencies, the court, *sua sponte*, or upon motion of the claimant, may direct or deny further proof, according to its legal discretion. But in no case is oral evidence admitted in prize-causes. (Ben. Adm. § 511, 512, 512 a; Id. p. 673 & seq; Rev. Stats. U. S. § 4615, 4617, 4622; The Dos Hermanos, 2 Wheat. 76; The Pizarro, Id. 227; The Friendschaft, 3 Wh. 14; The Atalanta, 3 Wh. 409; The Sally Magee, 3 Wal. 458-'9; The Sir Wm. Peel, 5 Wal. 534 & seq; The Gray Jacket, 5 Wal. 368; The Adriana, 1 Rob. 263 (303); The Sarah, 3 Rob. 330-'31; The Romeo, 6 Rob. 356.)

The necessary papers, and the examination *in preparatorio*, having been transmitted to the court, it is the duty of the captor to apply to the court without delay for adjudication; and in case of neglect and refusal on his part, the claimant may so apply. The proceedings for the condemnation of a prize are purely *in rem*. Inasmuch as all prizes are made, as we have seen, for the benefit of the sovereign, it might be supposed that it would be in all cases in the name and in behalf of the United States; but upon considerations of policy, and in order to encourage enterprise and daring on the part of public and private-armed ships, Congress has thought fit, in pursuance of the general policy of all maritime States, to relinquish to the individual actual captors in all cases a large portion, and in some the whole of the property captured; as for example, to national ships, one-half when the prize is of inferior force, and when of equal or superior force, the whole; and to privateers and letters of marque, the whole in either case, unless it be otherwise provided in the commissions issued to them. On the other hand, captures made by a non-com-

missioned captor belong exclusively to the United States, under the designation of *droits of the admiralty*. Hence, when the capture is made by a national vessel, the proceeding is in the name of the United States, by the United States district attorney filing a libel in the district court, and when made by a private-armed ship, it is by the commander's proctor, who files a libel in the district court on behalf of himself and the other captors. In either case a monition and warrant issues to the marshal to seize the property, the notice under the monition being made by publication. (Ben. Adm. § 512, b; Rev. Stats. U. S. § 4630, 4618 & seq; *The Dos Hermanos*, 2 Wh. 76; S. C. 10, Id. 306; *Jecker v. Montgomery*, 18 How. 124; *The Andromeda*, 2 Wal. 490.)

On the return day of the process, if no claim be interposed, upon the usual proclamation being made, and no person appearing, the default is entered, and the court proceeds to examine the evidence, and pronounce sentence. It is not usual, however, to condemn goods by default, unless the property appears clearly to belong to enemies, till the lapse of a year and a day after the service of the process; at the expiration of which time, no claim being interposed, if the evidence warrant it, the property is condemned of course, all question of former ownership is forever precluded, and distribution is made to the parties entitled. (Ben. Adm. § 512 c; *The Staadt Embden*, 1 Rob. 25; *The Harrison*, 1 Wheat. 298.)

Any claim to the property, whether legal or equitable, should be interposed upon affidavit at or before the return of the monition, or time assigned for trial, by the parties interested, if present, or if absent, by the master or some agent of the owner. A stranger is not permitted to make a claim, nor is a mere incumbrancer, as by a bottomry bond, mortgage, &c., whereby is created, not a *jus in re*, but only a *jus ad rem*; nor, indeed, can the ownership in any manner be changed, to the prejudice of the captor, after the commencement of the voyage. The affidavit sustaining the claim is called the *test affidavit*. It should be made by the parties themselves, if they are within the jurisdiction; if they are absent from the country, or at a great distance from the court, it may be made by an agent. It ought to state briefly the facts touching the claim and its verity, namely, that the property, at the date of the shipment, and also at the time of the capture, did belong, and if restored will belong to the claimant, together with such other special circumstances as may exist. If the captor unreasonably delays his proceedings, the claimant may resort to a monition to compel him to proceed to adjudication

(Ben. Adm. § 512 d; The Mentor, 1 Rob. 152; The Huldah, 3 Rob. 238-'9; The George, 3 Rob. 212; The William, 4 Rob. 214; The Tobago, 5 Rob. 221 & seq; The Susanna, 6 Rob. 51 & seq; The Marianna, Id. 25 & seq; The Frances, 8 Cr. 335; The Mary, 9 Cr. 126; The Adeline, 9 Cr. 244; The Monticello v. Mollison, 17 How. 152; The Sally Magee, 3 Wal. 559-'60; The Hampton, 5 Wal. 374.)

Upon the hearing, the sentence of the court is either a decree of *acquittal and restitution*, or of *condemnation*. If it be for restitution, and the property remains specifically in the custody of the court, a warrant or order issues for its delivery to the claimant; whilst if the property has been sold, and the proceeds are in court, an order is made for the delivery of the proceeds. Should damages be awarded against the captors, by reason of the want of probable cause of capture, or of any other misconduct on their part, the court appoints three commissioners to assess the damages. Costs and expenses are in the discretion of the court, and depend upon proof of probable cause of capture; that is, of circumstances which warrant a reasonable ground of suspicion of illegal traffic, and the like. But the ordering of further proof always implies probable cause. (The Einighaden, 1 Rob. 274; The Jemima, 3 Rob. 170; The Principe, Edw. 70; Del. Col. v. Arnold, 3 Dal. 333; Malay v. Shattuck, 3 Cr. 458; Locke v. United States, 7 Cr. 339; The Anna Maria, 3 Wheat. 314; The Amiable Nancy, 3 Wheat. 546; La Amistad de Rues, 5 Wheat. 385; The Mariana Flora, 11 Wheat. 1; The Thompson, 3 Wal. 162; The Dashing Wave, 5 Wal. 178; The Science, Id. 179.)

It will be remembered, that in general, the appeal from the district court is to the United States circuit court, (*Ante*, p. 276); but in prize causes, an appeal now lies from the district court directly to the supreme court of the United States, whenever the amount exceeds \$2,000, or in *any case*, on the certificate of the district judge, that the adjudication involves a question of general importance. (*Ante*, p. 284-'5; Rev. Stats. U. S. § 695-'6; The Admiral, 3 Wal. 611-'12; Withenberg v. U. States, 5 Wal. 821; The Alicia, 7 Wal. 572-'3.)

#### SUB-SECTION vi.

##### 6<sup>d</sup>. The Hearing.

Let us take notice under this head of, (1), The general principles of the hearing; (2), The evidence to be examined; (3), The effect in evidence of the pleadings; (4), The depositions of witnesses; and (5), The examination of parties; W. C.

### 1°. The general Principles of the Hearing.

When the cause is ready, either party, (both being regarded as *actors* or plaintiffs,) may give the required notice that at a designated time the court will be asked to hear it. The time of notice varies in the different districts, and in some the usage is to give no notice at all, but the clerk makes up the docket or list of causes at issue. Each party is expected to attend court, and when his causes are called, either to bring them on for trial, or by order of court or consent of the adversary, have them continued; or if his adversary be not present, have them dismissed or decided by default. And this latter is said to be the proper admiralty practice. It prevails in the supreme court of the United States, and might well be prescribed by that court as the rule in admiralty causes for all the district and circuit courts. (Ben. Adm. § 513, 568; *Jennings v. Carson*, 4 Cr. 2 & seq, 23.)

If the defendant has not appeared, or having appeared, has neither excepted to the libel nor answered it, he cannot, at the trial, be heard in his defence, nor introduce evidence into the cause, which in that case must be heard and adjudged *ex-parte*, upon the evidence offered by the libellant. This, indeed, is no more than that universal rule of forensic proceedings, that the evidence and arguments must be confined to the points put in issue by the pleadings, that is, by the allegations of the libel and denial of the answer. (Ben. Adm. § 514; *Lawrence v. Mintrun*, 17 How 110-'11; *McKinlay v. Morrish*, 21 How. 346 & seq.)

When either party fails to attend at the hearing, the adversary may take such decree as he would be entitled to if his pleadings were confessed. Postponements are in the discretion of the court, either without going into the trial at all, or after a partial hearing of the evidence or of the arguments of counsel, and may be granted with or without conditions as justice may require, as for example, that the party asking postponement shall consent to the taking of the depositions of witnesses, or to admit what is expected to be proved by them, &c. (Ben. Adm. § 515-'16.)

Admiralty causes are to be determined according to the allegations and proofs (which must correspond the one to the other, as in other forums.) The advocate for the libellant opens by a brief statement of the nature of the case and of the defence, and reads the libel; the advocate for the defence reads the answer, and if there be other pleadings, each reads his own. The proofs are then introduced in the same order, the court exercising a wide discretion as to the order of calling and re-calling witnesses and the course of examination, with which an appellate court is

not accustomed to interfere. (Ben. Adm. § 517; Phil. & Tr. R. R. Co. v. Stimpson, 14 Pet. 463.)

2°. The Evidence.

The competency of witnesses is determined in the admiralty courts of the United States by the law of the State where the court is held, even though that law violate the ordinary rules of evidence, as by allowing parties to the action to be witnesses, and all exceptions on the ground of competency must be made at the hearing. (Rev. Stats. U. S. § 858; Vance v. Campbell, 1 Bl. 480; Wright v. Bales, 2 Bl. 537; Ryan v. Bradley, 1 Wal. 68; Nelson v. Woodmot, 1 Bl. 169; Green v. U. States, 9 Wal. 655; Lucas v. Brooks, 18 Wal. 453; Texas v. Chiles, 21 Wal. 488.)

The legal effect in evidence of the answer is not, as in chancery, conclusive, unless contradicted by two witnesses, or by one witness and pregnant circumstances. It has no more force as evidence than the libel; and neither of them is evidence at all in the common sense of the word. But being solemn statements of facts by the parties, under the sanction of an oath, the court is bound to examine them with care, and cannot but be influenced thereby, so as sometimes, when the *proofs* are nicely balanced, to turn the scale. (Ben. Adm. § 518; Adm. Rules, 27, 28, 30, 31, 32; Dest. Fed. Proc. 323 & seq; 1 Abb. U. S. Pr. 153; Andrews v. Wall, 3 How. 672; 2 Hughes' Rep. 583, Rule, 73.) And whilst the defendant may by the libel be required to answer on oath all the interrogatories propounded by it touching the allegations, the defendant has in like manner the right in his answer to propound interrogatories to the libellant, to be answered upon oath or solemn affirmation; and either party may compel answers to such interrogatories, unless he will thereby be exposed to prosecution or punishment for a crime, or to any penalty or forfeiture for a penal offence. (Adm. Rules, 23, 31, 32; Dest. Fed. Proc. 321, 324; 1 Abb. U. S. Pr. 152 to 154.)

Depositions by the United States statutes are in civil cases allowed to be taken, not only by a *dedimus protestatem*, and in *perpetuam memoriam*, but also without commission, *de bene esse*, upon notice in writing to the adversary, stating the name of the witness, and the time and place of the taking of the deposition; or where, by reason of the absence of the adversary from the district, and want of an attorney of record, or other reason, direct notice is impracticable, the district or circuit judge, where the necessity is urgent, may direct how notice shall be given. They may be thus taken in the cases following:

- 1, When the witness lives more than 100 miles from the place of trial;
- 2, When he is bound on a voyage to sea;
- 3, When he is about to go out of the United States;
- 4, When he is about to go out of the district, and to a greater distance than 100 miles from the place of trial, before the time of trial; or,
- 5, When he is ancient or infirm. (Rev. Stats. U. S. § 863; Harris v. Wall, 7 How. 704.)

Such depositions may be taken before any United States judge, or commissioner, or any clerk of a district or circuit court, or before any State judge, or notary public. The witness is to be cautioned and sworn to testify the *whole truth*, his deposition to be reduced to writing by the officer taking it, or by himself in the officer's presence, and by *no other person*, and *subscribed* by deponent. The deposition is to be delivered by the officer taking it into court, or together with the officer's certificate of the reasons as aforesaid for taking it, and of the notice, if any, to the adverse party, is by him to be sealed up and directed to the court, and remain under his seal until opened in court. (Rev. Stats. U. S. § 863 to 865; Beale v. Thompson, 8 Cr. 70; Harris v. Wall, 7 How. 705.) The authority to take depositions being in derogation of the rules of the common law, has always been construed strictly, and, therefore, all the requisitions of the statute must appear to have been observed, before such testimony is admissible. (Bell v. Morrison, 1 Pet. 351; Harris v. Wall, 7 How. 704-5; Shutte v. Thompson, 15 Wal. 158 & seq.)

In order to entitle a party to read such depositions, when taken and certified in due form of law, he must show at the trial either,

- 1, That the witness is dead; or
- 2, That he is out of the United States; or
- 3, That he is gone to a greater distance than one hundred miles from the place of trial; or
- 4, That by reason of age or infirmity he is unable to appear in person. (Rev. Stats. U. S. § 865; Patapsco Ins. Co. v. Southgate, 5 Pet. 616 & seq; Harris v. Wall, 7 How. 704.)

But besides depositions *de bene esse*, which suppose the witness to reside in the United States, they may also be taken under a *dedimus potestatem*, and *in perpetuam memoriam*, wherever the witness resides, in all cases where it may be necessary to prevent a failure or delay of justice. So in any suit in which the United States have an interest, *letters rogatory*, or a *commission*, may be issued to a court or commissioner, to take the testimony of any witness who

is in a foreign country. And provision is made for compelling the attendance of the witness when he is within the United States. (Rev. Stats. U. S. § 866 to 868, 870, 875 & seq; *The Patapsco Ins. Co. v. Southgate*, 5 Pet. 618; *Sergeant v. Biddle*, 4 Wheat. 608; *Evans v. Hethih*, 7 Wheat. 453; *York Co. v. Central R. R.*, 3 Wal. 113.)

We have seen that, in the United States courts, the competency of parties to actions to be witnesses, like all other questions of competency, is regulated by the State law, (*Ante*, p. 1280; *Vance v. Campbell*, 1 Black. 430; *Wright v. Bales*, 2 Black. 535; *Ryan v. Bindley*, 1 Wal. 68); but in some instances, without reference to the State law, parties must, from the necessity of the case, and upon principles of public policy as well as of private justice, be admitted to testify even in their own behalf, as in cases of salvage, mariner's wages, and prize, the parties concerned being, for the most part, the only persons present. In these exceptional cases, let it be observed, the witnesses are not to be examined as to any matters except those to which their competency is limited. (Ben. Adm. § 534; Gr. Ev. § 348 to 350.) This practice, which is denominated the oath *in litem*, has long been familiar to the courts of admiralty, and other courts administering justice according to the course of the Roman law, although in the common law courts its use has been less frequent and more restricted. (1 Gr. Ev. § 348.)

The party himself is sometimes admitted as a witness (apart from any statute), in his own favor, in the case of what is styled his *suppletory oath*, where the proofs go far to establish his case, but are still imperfect. Here he may offer his own oath in corroboration of his proofs. This practice is derived from the necessity, under the civil law, of having more than one witness to establish a controverted fact, and prevails in all maritime causes. (Ben. Adm. § 536; 1 Gr. Ev. § 257 & seq; *Id.* § 348 to 350; *U. States v. Wood*, 14 Pet. 440; *Childrens v. Saxby*, 1 Vern. 207; *E. Ind. Co. v. Evans*, 1 Vern. 308.) And so, not in admiralty only, but in the chancery courts as well, the party's oath is admitted in his own behalf, to prove facts which, from their nature, none but a party could be likely to know, supposing a foundation to be first laid by proving the other facts of the case down to the point to which the party is to speak. Thus, a writing having been proved to be material, the party's diligent and vain search for it, or its loss or destruction may be proved by his own oath, so as to let in secondary proof of its contents. And so his own oath may prove the materiality of a witness, his inability to

attend the death of a subscribing witness, &c. (1 Gr. Ev. § 349, 558.)

Again, the oath or statement of the party taken *diverso intuitu*, is sometimes admissible in his favor. Thus, the certificate of an officer, when by law it is evidence for others, is competent evidence for himself, if at the time of making it he was authorized to do the act therein certified; and an account of sales rendered by a consignee may for some purposes be evidence in his favor against the consignor. (1 Gr. Ev. § 352; *Mertens v. Nottebohm*, 4 Grat. 173-4, 175.)

As to the *oath decisory*, as it is styled, the doctrine is that either party may tender it to the other, agreeing that the answer *shall be decisive of the cause*. The adversary is then bound either to accept the offer or to make a similar proposition in return. It is a mode of proof known to the Roman law, and therefore not unknown to the admiralty courts, but it is not in general use. (Ben. Adm. § 538.)

The testimony being concluded, the cause is argued, either immediately or at a future day, the advocate of the libellant usually commencing and concluding. But even after the argument, the court, for good cause shown, has the power, and, in a very strong case, will postpone its decree, and order that further proof be introduced, and that, either at the suggestion of the judge himself, or upon motion of either party, in consequence of the discovery of new evidence. (Ben. Adm. § 539, 540; *Donellan v. Donellan*, 2 Hag. Ecc. Sup. (4 Eng. Ecc.) 144; *Cargill v. Spence*, Id. 146; *Henley v. Morrison*, Id. 147; *Smith v. Blake*, 1 Hag. Ecc. (3 Eng. Ecc.) 88; *James v. Cohen*, 3 Curt. (7 Eng. Ecc.) 770, 786.)

#### SUB-SECTION VII.

##### 7<sup>a</sup>. The Decree.

The decree, according to the facts and the law, is in favor of the libellants or the defendants, or some of either or both, and against the others, with or without costs, for or against any or all of the parties, as justice may require. It may be, (1), *Interlocutory*; or (2), *Final*. It is *interlocutory*, notwithstanding it may dispose of the merits of the cause, when by the decree something still remains to be done by the court, before all the rights of the parties in the premises are fixed, and the recovering party has an order for execution; and is *final* when it disposes of the whole controversy, and leaves nothing further for the court to do in the cause, as when the libel is dismissed, or there is a decree for a sum of money, with or without costs. (Ben. Adm. § 541, 542.)

W. C.



## 1°. Interlocutory Decree.

When the decree is *against the libellant*, whether the suit be *in personam* or *in rem*, it is for the most part final, and the usual form is that the libel be *dismissed*, with or without costs, according to the justice of the case. But if it is in favor of the libellant, and for an uncertain amount of money, or for rights not otherwise definitely settled, the decree is interlocutory, and it is usual to determine the principles upon which the amount or the rights in question are to be adjusted, and then to refer it to a commissioner to ascertain and report to the court the precise amount payable, or the precise state of the rights to be decreed, just as is done upon a default of appearance or of answer. Hence it is not needful or expedient to introduce at the hearing, testimony touching the particulars of such accounts, but only so much as shows the right of the party to recover, and the extent of the inquiry, leaving the details to be made out in proof before the commissioner as the investigation and adjustment proceeds. (Ben. Adm. § 543.)

A copy of the order of reference should be served on the commissioner and on the opposite party. The commissioner then appoints the time and place of proceeding with the reference, of which notice must be given the adversary. At the hearing before the commissioner, the testimony already in the cause, and any other taken before the commissioner himself, is to be considered by him. The commissioner possesses the usual powers of masters in chancery, and may administer oaths, and examine parties and witnesses, compelling witnesses to appear and testify, and adjourning from time to time, so as to give opportunity to the parties to put in their proofs. (Ben. Adm. § 544; Adm. Rules, 44; Dest. Fed. Proc. 328; 1 Abb. U. S. Pr. 155; 2 Pars. Ship & Adm. 455 & seq.) It should be observed, however, that the commissioner's assessment of damages has not the effect of a verdict, but the court may modify or wholly reject it. (Sturgis v. Clough, 1 Wal. 272.)

Either party may except to the commissioner's report, in as many particulars as he shall think proper, stating the grounds of his exception with such precision as to enable the court, without unreasonable examination of the record, to perceive the basis of it, and must file and serve his exceptions, whereupon the cause is again put upon the docket for hearing upon the exceptions. If no exceptions are filed, the report is confirmed upon motion, without notice, and a final decree follows. (Ben. Adm. § 546; The Potomac, 2 Black, 581; Commander in Chief, 1 Wal. 43, 50; The Vanderbilt, 6 Wal. 230.)

## 2°. Final Decree.

Supposing the suit to be *in personam*, and the decree to be in favor of the libellant for a sum certain, the usual form of the decree is that the libellant recover against the defendant *and his stipulators*, the amount, with costs to be taxed, and that he have execution therefor. Such a decree is a lien upon the debtor's real estate, wherever the judgment or decree of a State court would be. (Ben. Adm. § 547; *Ward v. Chamberlain*, 2 Black, 430, 436 & seq.) A decree *in rem* directs the condemnation and sale of the property, if it be still in custody, and that the proceeds be brought into court. Or if the property has been delivered on stipulation, then that the stipulators pay into court the amount of their stipulation within a designated time, or else that a summary judgment be entered against them on their stipulation, and that execution issue thereon. When the suit is *in rem* it is not usual to render a decree *in personam*, for a decree must be *secundum allegata*, as well as *secundum probata*; but if the case proved show a clear right to recover *in personam*, the libellant may be permitted, even after a decree *in rem*, to introduce the proper allegations *in personam*, and proceed upon them to a further decree against the person. (Ben. Adm. § 547; 2 Pars. Ship. & Adm. 490 & seq; *McKinlay v. Morrish*, 21 How. 343.)

Where, after a decree, and before the end of the term, it appears that, by accident, oversight, mistake or misapprehension, the decree is erroneous, the court possesses the power to correct or alter it; but in order to induce it to do so, it must, in general, appear that the error arises from the defect of knowledge or information upon a particular point in the case, and it must be brought to the attention of the court with the utmost possible diligence. (Ben. Adm. § 548; 2 Pars. Ship. & Adm. 487 & seq. & notes.) Whether there may be a similar correction of a final decree after the end of the term, seems to admit of considerable doubt. (2 Pars. Ship. & Adm. 487 & seq. & notes; *The Palmyra*, 2 Wheat. 111; *Alviso v. U. States*, 6 Wal. 457; *The Monarch*, 1 Wm. Rob. 21.) It is probably the better opinion, as suggested by Mr. Justice Story in the case of *The Steamboat New England*, 3 Sumner, 493, that such correction can only be made by means of a libel in the nature of a bill of review in equity, under similar circumstances as in equity. (2 Pars. Ship. & Adm. 487 & seq. & n 2.) It is provided, however, by the rules in admiralty of the district court for the Eastern District of Virginia, that no libel of review will be entertained in that court in cases *subject to appeal*, nor unless filed before the

enrolment of the decree, or return of final process issued in the cause. (Rule cxxxv; 2 Hughes' R. 597.)

The costs in admiralty are entirely under the control of the court, and may thus be the means of amercing either of the parties for misconduct, and are a salutary check upon mischievous litigation. They are sometimes given to the successful party, and sometimes accorded to the libellant who fails, when he was misled to commence the suit by the act of the adversary. (Ben. Adm. § 549; *The Glasgow Packet*, 2 W. Rob. 314; *The Frances Mary*, 2 Hag. Adm. 91; *The Reliance*, Id. 90, note.) The general rule, however, is that the successful party is entitled to costs, and it is only under circumstances of peculiar equity, hardship, oppression, or negligence, that the court will, at its discretion, depart from that rule. Thus a previous demand of payment of a debt before suit brought, is so obviously required by fair dealing, that costs will be sometimes denied unless such demand be proved. So an unconscionable demand, or a demand pursued in a vexatious or unconscionable manner, will not usually carry costs. Thus, where a libellant advances a principal demand which he makes no real attempt to sustain, or which he must know to be unfounded, and recovers only a comparatively trivial amount, which, had it been presented alone, would not have been contested, it is not usual to allow him costs. Costs are never decreed *against the government*. (Ben. Adm. § 549: 1 Chit. Pl. 362-'3; *The Eliza*, 1 Wm. Rob. 328.)

The fees of proctors and advocates, as well as of clerks, marshal, &c., to be taxed against the losing party, having been formerly determined for the most part by the discretion of the court, since 1853, have been uniformly regulated by act of Congress. (Rev. Stats. U. S. § 823 & seq.) But the statute is to be understood as regulating the fees to be taxed as of course. It is the common course of the admiralty to allow, in its discretion, in addition to the ordinary charges, reasonable and necessary counsel fees to any proper amount actually incurred, either in the shape of damages, or as part of the costs. (*The Apollon*, 9 Wheat. 362; *Canter v. Am. Ins. Co.* 3 Pet. 307, 318-'19.)

Actions and processes ought not to be needlessly multiplied, and if they are, it is in the discretion of the court, upon application of the aggrieved party, with notice to the adversary, to make an order to consolidate them, and to compel the proctor, advocate, or other party conducting the causes, who appears to have thus proceeded unreasonably and vexatiously, to pay the excess of costs so occasioned. (Rev. Stats. U. S. § 977, 978; Ben. Adm. § 551; *The*

Frederick, 1 Hag. Adm. 225; Rules in Adm. E. Dist. of Va 88, 89; 2 Hughes' R. 587.)

And while, on the one hand, the court will protect a proctor from a collusive settlement to the prejudice of his right to his costs, it will on the other discourage any hard and sharp practice either in the proceedings in court, or in the negotiations between the parties. Hurrying up a suit without a demand for payment or reasonable indulgence, refusing to listen to offers of adjustment, making technical objections to a tender sufficient in amount, if made known to the court, are likely to be remembered in the decree upon the question of costs. Efforts to adjust a controversy are encouraged, and under all circumstances an offer to pay is equivalent to a technical tender, and a declaration that less than a certain sum will not be accepted, is considered as waiving a formal tender. The refusal of a fair tender exposes the party refusing to the loss of his costs, and sometimes to the payment of costs to the adversary. (Ben. Adm. § 552; The Frederick, 1 Hag. Adm. 218, 224; The Eleonora Charlotte, Id. 156; The John & Thomas, Id. 157.)

From the peculiar form of admiralty proceedings, it sometimes happens that justice requires the apportionment of costs, as when the court discriminates between parties in its decree, and some appeal and others do not; and so when the property is in custody in several causes, and the fees of the marshal for the keeping of the property have accrued for a common benefit to unconnected parties. (Ben. Adm. § 583.)

Costs are taxed on notice to the adversary by the judge or by the clerk, subject to an appeal to the judge, and are included in the decree; the taxed bill should be filed. (Ben. Adm. § 553; Rev. Stats. U. S. § 828, 983; Rules in Adm. E. Dist. of Va., 138; 2 Hughes' R. 598.)

The enrolment of the final decree by the clerk follows upon its being pronounced, and embraces the engrossment in the record-book, not only of the decree itself, but also of the pleadings, processes, stipulations, orders and *evidence* in the cause, arranged in chronological order, from the libel to the final decree, constituting a complete written history of the cause. (Ben. Adm. § 554.)

#### SUB-SECTION VIII.

#### 8<sup>d</sup>. Execution and Proceedings thereon.

The executions to carry admiralty decrees into effect are well adapted to the purpose in view. Where the decree is for the payment of money, the execution is in the nature of a writ of *fiery facias*, commanding the marshal to cause the amount decreed to be made out of the goods and chattels,

*lands and tenements* of the defendant or stipulator. Where the decree is *in rem* for a condemnation and sale, a writ of *venditioni exponas* is the proper execution, if the property is still in custody; or if it has been delivered on stipulation, an order is made that the stipulators perform the condition of the stipulation, and in default thereof that a summary judgment be entered against them thereon, on which an execution issues against them *in personam*. (Ben. Adm. § 555 to 557; 2 Pars. Ship. & Adm. 494; Adm. Rules, 21; Dest. Fed. Proc. 320; 1 Abb. U. S. Pr. 152; 2 Hughes' Rep. 595; Rule, 127.)

The writ of execution runs in the name of the President of the United States of America; bears *teste* by the judge of the court, is authenticated by the signature of the clerk, is addressed to the marshal of the district, and is returnable to the court whence it issues, which is, of course, the court where the decree is obtained. In favor of the United States, executions run *throughout the United States*, and in cases of individuals, *throughout the State*, even where there is more than one district therein. (Ben. Adm. § 556; Rev. Stats. U. S. § 986, 985.)

Where the property is still in custody, and a *venditioni exponas* issues, the marshal, on proper public notice, sells the property, and is required by rule of court to pay the proceeds forthwith into the registry of the court, to be by it disposed of according to law. (Adm. Rules, 41; Dest. Fed. Proc. 327; 1 Abb. U. S. Pr. 155; Wallis v. Thornton, 2 Brock, 422; The Collector, 6 Wheat. 194.)

The marshal's duty, under a writ of *venditioni exponas*, is solely to sell the property for cash, and bring the proceeds into court, deducting nothing but the expenses of sale. He ought not to undertake to distribute the money to the parties, even according to the decree, which may in the end be materially modified by the court. (Ben. Adm. § 559; The Collector, 6 Wheat. 194.)

Liens upon the property sold, accruing whilst it is in the custody of the law, such as wharfage, storage, labor, &c., cannot be paid by the marshal without an order of court, and *a fortiori* can he not discharge previously existing liens. (Ben. Adm. § 559; The Collector, 6 Wheat. 194.)

The moneys paid into the registry of the court are, by admiralty rule 42, required to be by the clerk immediately deposited in the name of the court in some bank designated by the court, not to be drawn out except by checks signed by a judge of the court, and countersigned by the clerk, stating on whose account, for whose use it is drawn, and in what suit, and out of what fund in particular it is to be paid. And the clerk shall keep a book, containing a memo-

random and copy of all the checks so drawn, and their date. (Adm. Rules, 42; Dest. Fed. Proc. 328; 1 Abb. U. S. Pr. 155.) The order of distribution of the funds in the registry often gives rise to grave questions. It is settled by the court according to the legal priority, although it is often referred to the clerk to report the claims and the order of preference. In claims of the same rank, the one first commencing his proceeding is preferred in the distribution. The party first seizing the property holds it against all other claims of no higher character; and debts of higher rank must be paid *in full*, to the exclusion of those of lower rank. The clerk's report may be excepted to, and thus the question of distribution submitted to the court for its final adjustment. (Ben. Adm. § 560; *Blaine v. The Charles Carter*, 4 Cr. 328.)

And so any person having an interest in any proceeds in the registry of the court, may, by petition and summary proceedings, apply to the court to pay them out to him, notwithstanding the decree, and upon due notice to the opposite party, if any, the court will proceed summarily to hear and decide the claim. (Ben. Adm. § 561.)

Any unappropriated balance remaining in court, in proceedings *in rem*, (which is sometimes known as *remnants and surplus*), will in like manner be disposed of by the court upon petition of any claimant. (Ben. Adm. § 562.) Thus, the proceeds of property affected by a lien, are still affected by it, in whosoever hands they may be, the title to the property itself always passing by the sale. Hence, such proceeds may be subject to demands not embraced in the suit, and will then remain to be disposed of by the court on motion or petition of the claimant, although the lien may be asserted, if the claimant so elects, by libel and monition in a new suit. (Ben. Adm. § 562; *The Sybil*, 4 Wheat. 98; *McLane v. U. States*, 6 Pet. 424; *Andrews v. Wall*, 3 How. 573.) It is, however, at present, well settled, that one cannot thus resort to the proceeds or remnants of the property, in order to enforce a demand which was *not a lien* upon the property, and *enforceable in the admiralty*. (Ben. Adm. § 562; *The Monte Allegree*, 9 Wheat. 616; *Buxton v. Snee*, 1 Ves. Senr. 154; *The Neptune*, 3 Hag. Adm. 129.)

#### SECTION IV.

#### 4°. Proceedings of an Independent or Auxiliary Character—Petitions, Motions, Orders, Rules, Notices.

It is time now to notice certain proceedings in admiralty which are not properly suits or actions, and yet are not infrequent in practice, being sometimes collateral and auxiliary to the regular proceedings, and sometimes independent there-

of. Thus, on the application of seamen alleging the unseaworthiness of their vessel, a survey by experts may be ordered; on the application by a master a sale by him as master, may be authorized; or other proceedings where no final decree or adjudication *inter partes* is sought; but the aid of the court is desired to authenticate or give solemnity and impartiality to what is authorized by statute, or by the general admiralty law. And so, whenever an order of court is desired, regulating, correcting, modifying, assisting, or arresting the proceedings in a cause, or authorizing any incidental, auxiliary, or provisional step therein, these independent or auxiliary proceedings are set on foot, not by formal suit or process, but by petition or motion, usually accompanied by notice to the adverse party, and are carried to their final determination by means of simple orders, or rules of court. (Ben. Adm. § 563.)

Where the proceeding is by *petition*, it is required that the fact on which the demand for relief is founded should be clearly set forth, either by a full statement, or by reference to pleadings, depositions, or other documents, and the relief itself which is desired be plainly indicated. The petition must be sworn to, and a copy served on the adversary's proctor, with such notice of the time of presenting the same as the rules of the court shall prescribe. (Ben. Adm. § 564.)

Where a *motion* is resorted to, the facts must be set forth in affidavits, or by proper reference to the pleadings, depositions, or other documents, and copies of the affidavits must be served, with a notice, stating not only the time when the motion will be submitted, but, as in the case of the petition, the relief which is sought. (Ben. Adm. § 565.)

Whether the proceeding is by petition or motion, the adverse party produces at the hearing, without service of copies or notice, such proofs, by affidavits or other documents, as may best answer his purpose. And on these two sets of papers the court usually disposes of the matter, unless, in the exercise of a sound discretion, opportunity is afforded by the court to the moving party to introduce rebutting or explanatory proofs, which is not very frequent. (Ben. Adm. § 565.)

In case of an *ex-parte* petition or motion, the court always requires, not only full proofs of the facts which will justify the order asked for, but also proof of diligence in endeavoring to give notice to the other party, if it be a matter of which he is entitled to notice. (Ben. Adm. § 565.)

In the English admiralty the court usually gives its directory orders in the form of a writ under the seal of the court. They are sometimes called commissions and sometimes warrants, *e. g.* commissions to take bail, to appraise, to sell, &c. In the American courts of admiralty, the order of the court, certified by the clerk, in practice, takes the place of the com-

mission or warrant, although the more expensive English proceeding is not illegal. (Ben. Adm. § 566.)

There are in admiralty no common motions, orders, and rules as of course, provided for by law, although there may be sometimes such by the rules of particular courts. But they are always to be entered by the clerk as made in court, either as of the stated term of the court, or as of a special court of that day. There are, however, many chamber-orders, or mandates of the judge, staying proceedings for a provisional purpose, extending or enlarging time, directing the issue of process, fixing the amount of bail, &c. These are made by the judge *ex-parte*, on affidavit showing the need, and are not entered on the minutes of the court, but are served on the opposite party by delivering him a copy: and if he be of opinion that the order has been granted improvidently, or on mistaken suggestion, he may apply for a hearing upon it, on an *ex-parte* order upon the adversary, to show cause why it should not be vacated. (Ben. Adm. § 567.)

As to *notices*, each court prescribes by its own rules what notice shall be given of the various steps in a cause to be brought before it; and unfortunately the time is not uniform. In the southern district of New York, all notices are of four days, unless the court, for sufficient causes, shall in any particular instance prescribe a shorter time. All notices and other papers to be served in a cause are to be served on the proctor, instead of the party, if a proctor has appeared in the cause. (Ben. Adm. § 568.) For the rules in the district court for the Eastern District of Virginia, see 2 Hughes' Rep. 588, 590, 591, Rules, 94, 95, 105, 106.

Each district, and each circuit court, may regulate its practice by general rules, at its discretion, in all cases not provided for by the general admiralty rules of the supreme court. (Adm. Rules, 46; Dist. Fed. Proc. 329; 1 Abb. U. S. Pr. 156; Wayman v. Southard, 10 Wheat. 1; Bank of U. S. v. Halstead, 10 Wheat. 51; Beers v. Haughton, 9 Pet. 359 & seq.) For the rules in admiralty adopted by the district court for the Eastern District of Virginia, see 2 Hughes' Rep. 566 & seq.

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## CHAPTER II

### *Of Appellate Jurisdiction in Admiralty.*

#### 2<sup>a</sup>. Appellate Jurisdiction in Admiralty.

The district courts of the United States being the lowest in the series of Federal courts, have, of course, no appellate, but only an original cognizance. In expounding the appellate jurisdiction in admiralty, therefore, we are to advert to (1), The



appellate jurisdiction in admiralty of the circuit court; and (2), The appellate jurisdiction in admiralty of the supreme court of the United States;

W. C.

#### SECTION I.

##### 1<sup>b</sup>. The Appellate Jurisdiction in Admiralty of the Circuit Courts of the United States.

The circuit courts, as we have seen (*Ante*, p. 249, 319, 1255), have no original civil jurisdiction in admiralty. But in case of the disability of the district judge, admiralty-causes pending in his court may be transferred to the circuit court for original hearing, ample provision being made to facilitate the dispatch of such causes, by authorizing the district clerk to take, during such disability, all examinations and depositions of witnesses, and make all necessary rules and orders preparatory to the final hearing. (Rev. Stats. U. S. § 587 to 590.)

Appeals lie in admiralty causes (except *prize-causes*) from all final decrees in a district court to the circuit court to be next holden for that district, when the matter in dispute, exclusive of costs, shall exceed the sum or value of \$50. (Rev. Stats. U. S. § 631.) In *prize-causes*, the appeal is to the supreme court of the United States, when the matter in dispute, exclusive of costs, exceeds \$2,000, and without regard to the value of the matter in dispute, on the certificate of the district judge that the adjudication involves a question of general importance. (Rev. Stats. U. S. § 695; *The Admiral*, 3 Wal. 611-'12; *Withenburg v. United States*, 5 Wal. 821; *The Alicia*, 7 Wal. 572-'3.)

It will be observed, that by statute it is only a *final decree* from which an appeal may be taken, and not from an interlocutory decree, or any incidental order. But the appeal from the final decree brings up for review all the orders, decrees, and proceedings in the cause. (Ben. Adm. § 579; *The Appollon*, 9 Wheat. 376; *The Palmyra*, 12 Wheat. 1; *Mordecai v. Lindsay*, 19 How. 201; *Montgomery v. Anderson*, 21 How. 386; *Barton v. Forsythe*, 5 Wal. 190.) And in furtherance of the manifest intent of the legislature in allowing appeals from *final* decrees alone, it is held to be of great importance to the due administration of justice, that causes should not be carried up in fragments upon successive appeals, which would occasion very great delay and oppressive expenses. Hence, if one party appeals, and the other does not, the latter will be deemed to have waived whatever objections he might have made to the decree, and will be bound by the decree of the court above, as well as below. The losing party in the lower court cannot be heard in the appellate court in opposition to the decree of the court below, unless he himself appealed from the decree. (*The Wm. Bagalay*, 5 Wal. 412; *The Marie Martin*, 12 Wal. 31;

The Mabey, 13 Wal. 741.) Hence also may be derived the true criterion of a *final decree*, which does not necessarily decide upon the substantial merits of the action, but is one that completes the decretal action of the court in the cause; so that the appeal brings up for review at once all that the court has done in the cause, so far as it may injuriously affect the appellant, thus enabling the court above to do what the court below should have done, or remand the cause with directions which shall supersede the occasion for another appeal. (Ben. Adm. § 580; *Canter v. Am. Ins. Co.* 3 Pet. 318; *The Santa Maria*, 10 Wheat. 431; *The Palmyra*, Id. 502; *Chase v. Vasquez*, 11 Wheat. 429.) If, therefore, any order remains to be made, whether for costs, for confirmation of a report, for distribution or otherwise, there can be no appeal until such order is made, for until then the decree is not final. (Ben. Adm. § 579; *The Santa Maria*, 10 Wheat. 431; *The Palmyra*, Id. 502; *Chase v. Vasquez*, 18 Wheat. 431; *Perkins v. Fourniquet*, 6 How. 206; *Pulliam v. Christian*, Id. 209; *Craighead v. Wilson*, 18 How. 199; *Beale v. Russell*, 19 How. 283; *Farely v. Woodfolk*, Id. 288; *Montgomery v. Anderson*, 21 How. 386; *Wheeler v. Harris*, 13 Wal. 51; *French v. Shoemaker*, 12 Wal. 86. But see *Thompson v. Dean*, 7 Wal. 342; *R. R. Co. v. Bradley*, 7 Wal. 575.)

No appeal or writ of error can be maintained where the matter rests merely in the sound *discretion* of the court below. (*Mar. Ins. Co. v. Hodgson*, 6 Cr. 206; *Welsh v. Mandeville*, 7 Cr. 152; *Chirac v. Reinicker*, 11 Wheat. 280; *Brockett v. Brockett*, 2 How. 240; *Canter v. Am. Ins. Co.* 3 Pet. 307; *Hobart v. Drohan*, 10 Pet. 108.)

If the matter in dispute does not *exceed* \$50, *exclusive of costs*, no appeal to the circuit court lies; but if the amount authorizes an appeal, the question of costs is subject to review, as well as any other question. (Ben. Adm. § 581; *Canter v. Am. Ins. Co.* 3 Pet. 319; *U. States v. The Malek Adhel*, 2 How. 237.)

Where the libellant appeals, the amount of the matter in dispute is the amount demanded in the libel; and where the defendant or claimant appeals, it is the amount or value adjudged or decreed against him. (*Ante*, p. 283.) And if there be no amount specifically demanded, the amount may be shown by affidavit or otherwise, so, however, as not to deviate from the value as stated in the proceedings, the court upon the question of amount leaning to a liberal construction in favor of the right of appeal. And when the rights of the parties are *separate*, though they be co-libellants or co-defendants, and the decree is distributive, as in cases of salvage, mariner's wages, and the like, the aggregate amount does not determine the right to appeal, but each party's *separate interest* must ex-

ceed \$50. (Ben. Adm. § 581; *Williamson v. Kincaid*, 4 Dal. 20; *Comer v. Stead*, Id. 22; *Richmond v. City of Milwaukee*, 21 How. 392; *U. States v. The Unison*, 4 Cr. 216; *Wise v. Columbia T. P. Co.* 7 Cr. 276; *Gordon v. Ogden*, 3 Pet. 34-'5; *Smith v. Honey*, Id. 469; *Knapp v. Banks*, 2 How. 73; *U. States v. Boxes of Sugar*, 7 Pet. 459 & seq; *Stratton v. Farris*, 8 Pet. 4; *Gruner v. U. States*, 11 How. 163; *Udell v. The Ohio*, 17 How. 17; *Olney v. The Falcon*, Id. 19; *Clifton v. Sheldon*, 23 How. 481; *Sampson v. Walsh*, 24 How. 207; *Seaver v. Bigelow*, 5 Wal. 208; *The Patapsco*, 12 Wal. 451; *Parker v. Latey*, 12 Wal. 390; *The Grace Girdler*, 6 Wal. 441.)

On an appeal by one party from a part only of a decree, the whole decree is brought up for review; and after a decision of the appeal, the circuit court executes the whole decree, without remanding the cause to the district court. (Ben. Adm. § 581 a; *Montgomery v. Anderson*, 21 How. 388.)

All appeals from the district court to the circuit court, must be made to the circuit court *next* to be holden in the district, and while the district court is sitting, or within such other time as the district court, by its general rules, or by special order, shall direct, or in the absence of such rule or order, within thirty days from the rendering of the decree. (Adm. Rules, 45; *Dest. Fed. Proc.* 329; 1 Abb. U. S. Pr. 155; 13 Wal. xiv; *The Nuestra Senora de Regla*, 17 Wal. 31.) Thus the rules of the district court for the Eastern District of Virginia (132) allow ten days from the time of rendering the decree, to enter an appeal, within which time the decree shall not be executed. The appeal is sufficiently entered by a brief notice in writing to the clerk and opposite proctor, that the party appeals in the cause, without any petition to the court for leave to enter it. (2 Hughes' Rep. 596.)

And when an appeal is entered, the appellant shall, within ten days thereafter, give security for damages and costs, or else the decree may be executed as if there had been no appeal, unless further time be allowed by the court. And within fifteen days after the appeal entered, the appellant shall cause a transcript of the proceedings to be transmitted to the circuit court, or else the decree shall be executed as if there was no appeal, unless the court, upon the special motion of the appellant, shall order otherwise. (Rules E. Dist. Va. 133, 134; 2 Hughes' R. 596-'7; *Infra* p. .)

The appellant must give four days' notice to the adverse party, or to his proctor, if he have one, of the time and place of giving the stipulation, and of the persons proposed as sureties. The sureties must then *justify*, or submit to an examination as to their sufficiency. The stipulation is in double the amount of the decree for damages, or debt and costs, when

the defendant appeals, and in such sum as may be fixed by the court, if the appeal is by the libellant. (Ben. Adm. § 585; Id. p. 688.)

The rules of the circuit court, as *e. g.* of the circuit court for the Southern District of New York, sometimes require a more formal entry of the appeal, and when such rules exist, the appeal must conform thereto. (Ben. Adm. § 585; Id. p. 393, Rule, 118.)

The *citation* or summons to the appellee to answer the appeal, when the appeal is from the district to the circuit court, must be signed by the judge of the district court, or by one of the judges of the circuit court, and the adverse party must have at least twenty days' notice. When the appeal is from a circuit court to the supreme court, the *citation* is to be signed by a judge of the circuit court, or by a justice of the supreme court, and the adverse party is to have at least thirty days' notice. (Rev. Stats. U. S. § 998, 999; U. S. v. Hodge, 3 How. 534; Sheppard v. Wilson, 5 How. 213; Villabolas v. U. S. 6 How. 89, 90; Davidson v. Lanier, 4 Wal. 453; Palmer v. Donner, 7 Wal. 541; Bartemeyer v. Iowa, 14 Wal. 27.)

Every justice or judge who signs a citation on appeal is required, except in cases brought up by the United States, or by any department of government, to take good and sufficient security as above mentioned, that the appellant shall prosecute his appeal to effect; and if he fail, answer all damages and costs if execution is stayed, and all costs only where execution is not stayed. (Rev. Stats. U. S. § 1000; *Supra*, p. 1294.)

The parties are admitted to allege and prove in an appellate court in admiralty whatever they might have alleged and proved in the court below, provided only that *no new subject of controversy* shall thus be introduced in the appellate court. (Ben. Adm. § 586; Id. § 483; *Ante*, p. 1285; Rev. Stats. U. S. § 698; The Oler, 2 Hugues, 14.) The effect of thus allowing new allegations and new proofs in an appellate court, is to make a three-fold classification of appeals needful, namely:

(1), Where upon the *same pleadings and proofs* the cause is to be heard in the appellate court;

(2), Where the cause is to be heard in the appellate court upon the same pleadings and proofs as in the court below, and upon *other allegations and testimony* introduced for the first time in the court above; and

(3), Where the whole proceeding is re-constructed, *new pleadings and allegations and new proofs* are put in, and the cause proceeds as though it had never been heard in the court below. (Ben. Adm. § 586.) It should be observed that appeals of the last class are rarely if ever necessary or expedient. (Ben. Adm. § 587.)

Accordingly, the rules in admiralty of the circuit court for the Southern District of New York make different provisions for these several cases, in respect to the preparation of the formal petition of appeal. See Ben. Adm. p. 393, 394; Rules 119, 121 to 123.

The manner of making up records in the district courts, to be transmitted to the circuit courts on appeals, and the contents of the record, are prescribed by the admiralty rules of the supreme court. (Rules 52; Dist. Fed. Pro. 331-'2; 1 Abb. U. S. Pr. 157; 17 How. vi; The Grace Gridler, 6 Wal. 441; White v. Cannon, 6 Wal. 443; The Vaughan, &c., 14 Wal. 258.)

Within four days after the documents are completed by the clerk of the district court, the appellant must cause them to be filed in the circuit court under penalty of being deemed to have deserted his cause, which being certified to the court below, that court may proceed to execute its decree. (Ben. Adm. § 588; Id. p. 393, Rule, 124; Id. p. 684.)

The circuit court is deemed to be possessed of the cause, and of the property involved in it, from the time of filing the appeal with the accompanying documents, and thenceforward it is not in the district court at all, nor can that court make any further order respecting it. All orders must be made by the circuit court, which must execute its own judgment without the intervention of the district court; whilst upon appeals from the circuit court to the supreme court, that court does not execute its own sentence, but awards its mandate to the circuit court to issue execution. (Ben. Adm. § 588, 589; Id. p. 394, Rule, 125; The Collector, 6 Wheat. 194; Montgomery v. Anderson, 21 How. 386; The Lady Pike, 6 Otto. (96 U. S.) 465-'6.)

The appeal suspends the execution of the sentence below by its own inherent effect; but if the inferior court should notwithstanding proceed to execute it, the appellate court will, on notice and hearing the parties, award an inhibition thereto. Meanwhile the cause in the appellate court is to be heard *de novo*, as if no sentence had been passed, and consequently the final decree in the appellate court is determined by the law and the facts as they exist when it is pronounced. (Ben. Adm. § 590, 591; Penballow v. Doane, 3 Dal. 54; Yeaton v. U. States, 5 Cr. 281; U. States v. Preston, 3 Pet. 66-'7.)

It is worth while to observe, that the record or *return* sent from the court below, in response to the citation or summons issued upon the appeal, is denominated, quaintly enough, *apostles*, from the Greek, *ἀποστέλλειν*, to send away. (Ben. Adm. p. 687, 692.) But it seems *apostles* are not necessary when the appeal is in writing, seeing that the instru-

ment of appeal itself contains the whole matter of complaint. (2 Bro. Civ. & Adm. Law. 438, and n. (53).)

The appeal being perfected, and the proper documents returned to the circuit court, the appellant's proctor should notify the proctor of the appellee thereof, when the proctor of the appellee should enter his appearance by a written notice to the clerk; and if he omits to do so within the first two days in the term next after he is notified of the filing of the return, the case may be brought on by the appellant, and heard *ex parte*. (Ben. Adm. § 592; Id. 394-'5, Rule, 126.)

If the appeal is of that kind that requires new pleadings, they are to be filed accordingly within the times limited by the court, and the cause proceeds like a new trial of an original cause. The written depositions and answers to interrogatories and other written testimony from the district court may be used in the circuit court. But the further proof by witnesses, if any, must be by depositions taken before a commissioner of the United States, or other duly authorized officer, with notice to the adverse party, unless the court, or one of the judges, shall, upon motion, allow a commission to issue, to take such depositions upon written interrogatories and cross-interrogations. (Ben. Adm. § 593-'4; Id. p. 395, Rules, 131, 132; Adm. Rules, 49; Dest. Fed. Proc. 330; 13 How. vi; The Samuel, 1 Wheat. 9; The Georgia, 7 Wal. 38.) On the other hand, if the appellee desires to show cause why new allegations or proofs should not be allowed, or new relief prayed, he must give four days' notice thereof, accompanied by affidavit of the cause, which must be made to appear within the first two days of the term, or else the appeal shall be allowed according to its terms. (Ben. Adm. p. 394, Rule 130.)

In the circuit, as in the district court, both parties are *actors*, and may give notice of and bring on the hearing; the libellant opening and closing the case; and the same observations with respect to the decree and appeal thereupon are applicable as in the district court. (Ben. Adm. § 594, 580; *Ante*, p. 1279 & seq.)

By the strict admiralty practice, the clerk of the court takes down in writing the *viva voce* testimony of the witnesses, in order that it may be returned as part of the record in case of appeal. This practice, which is productive of much delay and expense, is mitigated in some districts by substituting the notes taken by the district judge for those of the clerk, each party producing such other proofs as are in his power; and it is suggested in the clear and satisfactory work upon admiralty practice of Judge Benedict, that it would be still further improved by adopting uniformly, by rule of the supreme court, a usage which prevails in the *circuit court* for the Southern

District of New York, of the parties, by their respective proctors settling between them, with the aid of the judge, a statement of the testimony in the cause. (Ben. Adm. § 595; Id. p. 396, Rule 135.) As an appeal from a district to a circuit court may be taken at any time within one year, there is an evident propriety in requiring the statement of the testimony in all appealable cases to be settled and filed while the facts are recent. (Rev. Stats. U. S. § 635.)

Wherever the appellee can show good reason to apprehend that the decree of the district court should be immediately carried into effect, subject to the ultimate decision on appeal, (as where the security of a party is likely to be seriously impaired by delay,) the circuit court will, on his motion, so direct, upon his giving his own stipulation to abide and perform the ultimate decree; unless the appellant shall give security, by the stipulation of himself and competent sureties, for payment of all damages and costs on the appeal. (Ben. Adm. § 596; Id. p. 396, Rule 133.)

The circuit court may affirm, modify, or reverse any judgment, decree, or order of a district court brought before it for review, or may direct such judgment, decree, or order to be rendered, or such further proceedings to be had by the district court as the justice of the case may require. (Rev. Stats. U. S. § 636.) And the decree of the circuit court is carried into effect just as that of the district court is. (Ben. Adm. § 598, 555 & seq; *Ante*, p. 1287, & seq.)

#### SECTION II.

#### 2<sup>b</sup>. Appellate Jurisdiction in Admiralty of the United States Supreme Court.

The original jurisdiction of the supreme court, it will be remembered, is confined to cases where a State or a foreign minister or consul is a party, (*Ante*, p. 279, &c.) and *in admiralty*, such cases can occur still more rarely than in other departments of the law. Whenever such instances arise, the practice therein will be the same as in the circuit and district courts in similar cases, except where it may be otherwise prescribed by the rules of the supreme court itself. (Ben. Adm. § 599.)

An appeal is allowed to the supreme court from all final decrees of any circuit court, or of any district court acting as a circuit court, in case of admiralty and maritime jurisdiction, or of any district court *in prize-causes*, where the matter in dispute, exclusive of costs, exceeds the sum or value of \$2,000; or in *prize-causes* without reference to the value of the matter in dispute, on the certificate of the district judge that the adjudication involves a question of *general importance*. And so, in respect to prize-causes depending in any circuit court on the 30th of June, 1864. (Rev. Stats. U. S. § 692, 695, 696;

The Admiral, 3 Wal. 611; Withenburgh v. United States, 5 Wal. 821; The Alicia, 7 Wal. 573.)

The doctrines as to the amount in dispute, as well as in respect to the character of a *final decree*, are essentially the same as those already set forth as to appeals from the district to the circuit court. (*Ante*, p. 1292 &c.; Udall v. The Ohio, 17 How. 13; Olney v. The Falcon, Id. 22; Clifton v. Shelton, 23 How. 483; Sampson v. Welsh, 24 How. 208.)

In ordinary admiralty causes, appeals from a circuit or district court to the supreme court, are limited to two years after the entry of the decree or order, (saving the disabilities of infancy, insanity and imprisonment); and in *prize causes* they must be made within thirty days after the rendering of the decree, unless the court shall previously extend the time, for cause shown in the particular case; although the supreme court may allow an appeal if it appear that any appeal or notice of appeal was filed with the clerk of the district court within thirty days next after the rendering of the decree therein. (Rev. Stats. U. S. § 1008, 1009; The Protector, 9 Wal. 687; The Neustra Senora de Regla, 16 Wal. 29.)

Let us note (1), The several steps in taking an appeal; (2), The entry of an appearance by the appellee; (3), Amendments in respect to allegations and proofs; (4), Change of parties by death; (5), Hearing in the supreme court; (6), Decree of the supreme court; and (7), The *remittitur* and mandate to the court below;

W. C.

#### 1<sup>o</sup>. The several steps in Taking an Appeal.

The several steps in taking an appeal are (1), The appeal; (2), The security; (3), The citation; (4), The return; and (5), The bond to be given by the appellant. (Ben. Adm. § 601, Id. p. 689 & seq; The Dos Hermanos, 10 Wheat. 306.)

W. C.

#### 1<sup>a</sup>. The Appeal.

The appeal, which is a *written petition* addressed to the supreme court, is entitled in the cause in the circuit court, is signed by the appellant or his proctor, briefly recites the proceedings in the circuit court, and is filed with the clerk of that court, and a copy is lodged with the clerk, for the adverse party, within ten days, Sundays excepted, after the filing of the decrees complained of; that is, in order that the appeal may operate *per se* as a stay of execution. No allowance of the appeal by the court is needful. As soon as the appeal is made, the appellant, within a limited time, usually four days to each side alternately, must, in conjunction with his adversary, and if need be with the aid of the judge who heard the cause, settle a statement of the testimony on the trial, except such as was in writing, which it suffices pro-



perly to refer to; and this statement, which is engrossed by the clerk, and together with the written evidence is deemed to constitute the proofs upon which the decree was made, operates as a stay of further proceedings in the circuit court. (Ben. Adm. § 602, 597; Id. p. 396, Rule 135; Id. p. 684, 689; Davidson v. Lanier, 4 Wal. 458.) Supposing the appeal not to be taken within the time prescribed, the circuit court may proceed to carry its sentence into effect, and then, in order to arrest the proceedings therein, after the appeal is filed, it may be necessary to resort to an inhibition or *superseas* from the supreme court to the circuit court. (Ben. Adm. p. 687.)

A transcript of the record, made up as is directed by admiralty rules, 52, (Dest. Fed. Proc. 331,) must be filed at the term of the supreme court next after the entering of the appeal, or else the appeal is invalidated, and must be entered anew. (Rev. Stats. U. S. § 997; U. States v. Hodge, 3 How. 534; Villabolas v. U. States, 6 How. 90; U. States v. Curry, 6 How. 112; The Virginia v. West, 19 How. 182-'3; Mesa v. U. States, 2 Black, 721; Custis v. U. States, 3 Wal. 49, 50.)

#### 2<sup>d</sup>. The Security.

We shall presently see that, for the most part, a citation or summons must be issued upon entering an appeal, in order to bring the appellee before the appellate court. Let it be observed, that before any judge shall sign such citation, he must, save where the United States is the appellant, take care that the appellant has executed a bond, payable to the appellee, properly conditioned, with security which the judge must approve, (and to that end had best certify on the bond its sufficiency,) that the appellant will prosecute his appeal with effect; and answer all damages and costs if he fails to make it good. Where no stay of proceedings is desired, the security is in such amount as the judge shall deem sufficient to meet the costs should the decree be affirmed; but if there is expected to be a stay of execution, the security should be in a sum sufficient to secure the debt, damages and costs. The bond is filed in the circuit court, and remains there, because the supreme court does not execute its own decree, but remands the cause to the circuit court to carry it into effect. (Ben. Adm. § 603, 598; Id. p. 690; Rev. Stats. U. S. § 1000; Catlett v. Brodie, 9 Wheat. 553; Davenport v. Fletcher, 16 How. 144; Silver v. Ladd, 6 Wal. 440; Rubber Co. v. Goodyear, 6 Wal. 156; French v. Shoemaker, 12 Wal. 99; Probst v. Probst, 2 Wal. 96; Bigler v. Waller, 12 Wal. 149.)

And it may be observed, that if the appeal be taken within the time prescribed, that is, in ordinary cases in admi-

rality, two years, and in prize causes thirty days, the bond may be given after the lapse of that time. (Ben. Adm. § 603; *The Dos Hermanos*, 10 Wheat. 306; *Probst v. Probst*, 2 Wal. 86; *Bigler v. Waller*, 12 Wal. 149.)

3<sup>d</sup>. The Citation.

When the appeal is not made in open court, and at the term at which the final decree was passed, or even though it is asked for in open court, if the security is not taken until after the term, a citation or summons to the opposite party is necessary. (*Riley v. Lamar*, 2 Cr. 344; *Brockett v. Brockett*, 2 How. 238; *Yeaton v. Lenox*, 7 Pet. 220; *U. States v. Gomez*, 1 Wal. 690.) It must be signed by a judge of the circuit court which rendered the decree, or a judge of the supreme court, giving the adversary at least thirty days' notice, (as between the circuit and district court the notice, as we have seen, is twenty days), the effect of which is to prevent the cause from being heard before the lapse of thirty days after the service of the notice, unless the appellee appear. And it must be observed, that the original citation, signed *by the judge*, must be returned and filed. (Rev. Stats. U. S. § 999, 998; Ben. Adm. p. 691; *Wilson v. Daniel*, 3 Dal. 401; *Lloyd v. Alexander*, 1 Cr. 365; *The San Pedro*, 2 Wheat. 142; *Villabolos v. U. S.* 6 How. 40; *Buckingham v. McLean*, 13 How. 151; *Shepard v. Wilson*, 5 How. 211; *U. States v. Hodge*, 3 How. 534; *Villabolos v. U. States*, 6 How. 81; *Davenport v. Fletcher*, 16 How. 142; *Nat. Bank v. Omaha*, 6 Otto. (96 U. S.) 737.) The service of the citation upon the appellee may be proved by the affidavit of any disinterested person. (Ben. Adm. p. 692.)

An appearance by counsel is a waiver of the citation, and cures, therefore, any irregularity therein, unless when the appearance is entered notice is given of a motion to dismiss the appeal for want of a citation, and that the appearance was entered for that purpose. (*U. States v. Yates*, 6 How. 605; *Buckingham v. McLean*, 13 How. 150; *Carroll v. Dorsey*, 20 How. 209; *Chaffes v. Hayward*, Id. 209-10; *McDonough v. Millandon*, 3 How. 693; *Sage v. R. R. Co.* 6 Otto. (96 U. S.) 712.)

4<sup>d</sup>. The Return of the Transcript of the Record.

The *return*, made by the clerk of the circuit court to the first day of the next term of the supreme court, or if the decree were less than thirty days before such first day, to the *third Monday* of the term, must contain every thing needful to place the whole case before the supreme court, in a manner to be fully heard. Hence it certifies the *whole record*, containing in itself, without references *aliunde*, all the papers, exhibits, depositions, statement of testimony as set-

tled, and other proceedings from the beginning, in the district as well as in the circuit court. And the record must also contain all objections urged to the testimony, or else such objections are deemed to be waived. (Ben. Adm. § 605; Gen. Rules Sup. Ct. Rule 8; 21 How. vii; 6 Wal. vi; 15 Wal. 5; Dest. Fed. Proc. 249-'50; Rule 13; 9 Wheat. iv; 1 Pet. xi; Dest. Fed. Proc. 255.)

5<sup>d</sup>. The Bond given by Appellant to the Clerk for Costs.

It is made the duty of every justice or judge who signs a citation on any appeal, except in cases brought up by the United States, or some department of the government, to take good and sufficient security that the appellant shall prosecute his appeal to effect, and if he fail, shall answer all damages and costs where execution is stayed, or all costs only execution is not stayed. (Rev. Stats. U. S. § 1000; *Supra*, 1300.)

It is furthermore provided by a rule of the supreme court, that in all cases the appellant, on docketing the cause and filing the record, shall enter into an undertaking with the clerk, with security to his satisfaction, for the payment of his fees, or otherwise satisfy him in that behalf. (Rules Supreme Ct. Rule 10; 1 Otto, (91 U. S.) vii; 5 Pet. 724; Owings v. Tiernan, 10 Pet. 447; Van Renssalaer v. Watts, 7 How. 785; Dest. Fed. Proc. 252.) And in prize-causes, the court may require any party, at any stage of the cause, and on claiming an appeal, to give security for costs. (Rev. Stats. U. S. § 4638.)

2<sup>c</sup>. The Entry of an Appearance by the Appellee.

Each party should enter his appearance in person, or by proctor, immediately after a return of the appeal. Or else, where there is no appearance of the appellant, when the case is called for trial, the appellee may have the appeal dismissed, or may open the record and pray for an affirmation of the decree; or if the appellee be in default, the court may hear an argument on the part of the appellant, and give judgment according to the right of the cause; or if both parties shall be in default, the appeal shall be dismissed at the costs of the appellant. (Rules Supreme Ct. Rules 16, 17, 18; 3 Pet. xvii; 1 Pet. vii; 12 How. xi; United States v. Yates, 6 How. 605; Dest. Fed. Proc. 257-'8.) But in cases of dismissal for want of jurisdiction, the fees for the copy of the record shall be taxed against the party bringing the cause into court, unless the court shall otherwise direct. (1 Otto, (91 U. S.) vii; Dest. Fed. Proc. 253, Rule 10.)

Where the decree is rendered thirty days before the commencement of the term of the supreme court, the appellant must docket the cause and file the record with the clerk of that court within the first six days of the term; but where

the decree is rendered less than thirty days before the commencement of the term, the cause must be docketed and the record filed within the first thirty days of the term; or else the appellee may have the cause docketed and *dismissed*, upon producing a certificate from the clerk of the court below, stating that the appeal had been duly sued out and allowed, or at his option, may himself file a copy of the record, and let the cause stand for argument at the term. (Rules Supreme Ct., Rule, 9; 21 How. vii, viii; 2 Wal. viii; Dest. Fed. Proc. 250 & seq.)

3°. Amendments in respect to Allegations and Proofs.

Amendments in the allegations, and additional proofs, are allowed in the appellate court with great liberality, but not in general, so as to introduce a new subject of controversy. If justice requires that a new claim should be put in, or otherwise a new subject introduced, the court will remand the cause to the court below, with directions to permit to be done that which is needful. (Ben. Adm. § 609; *The Caroline*, 7 Cr. 496; *The Mary*, 8 Cr. 388; *The Société*, 9 Cr. 209; *Honceman v. The N. Carolina*, 15 Pet. 50; *The Potosmac*, 2 Bl. 584.) But in prize-causes, the supreme court, if in its judgment the purposes of justice require it, may allow any amendment, either in form or substance, of any appeal in prize causes, or allow a prize appeal therein, if it appears that any notice of appeal, or of intention to appeal, was filed with the clerk of the district court within thirty days after the rendition of the final decree. (Rev. Stats. U. S. § 1006, 4636.)

In all cases of admiralty and maritime jurisdiction where new evidence is admissible, the evidence by testimony of witnesses must be taken under a commission issued from the supreme court, or from any United States circuit court, under the direction of any judge thereof; and no such commission shall issue but upon interrogatories filed by the applicant, and notice to the adversary, accompanied with a copy of the interrogatories, to file cross-interrogatories, within twenty days. But this shall not prevent any party from giving oral testimony in court where by law it is admissible. (Rules Supreme Ct., Rule, 12; Desty's Fed. Proc. 254; 2 Wheat. vii; 1 Pet. ix; *The James Wells*, 7 Cr. 22; *Hawthorne v. U. States*, Id. 107; *The Mabey*, 10, Wal. 419; *The Western Metropolis*, 12 Wal. 309.)

4°. Change of Parties by Death.

When, pending an appeal in the supreme court, either party dies, (supposing there is no survivorship to the survivors), the personal representative of the decedent may voluntarily come in, and be admitted a party to the suit, and thereupon the cause shall be heard and determined as in

other cases. And if such representative does not voluntarily become a party, the adversary may suggest the death on the record, and on motion have an order that, unless such representative shall become a party within the first ten days of the ensuing term, the party moving for the order, if appellee, may have the appeal dismissed, and if appellant, shall be entitled to open the record, and on hearing have the decree reversed if erroneous. *Provided*, that the order be printed in some newspaper in Washington, which prints by authority the laws of the United States, for three successive weeks, at least sixty days before the beginning of the next term of the supreme court. And where the death of a party is suggested, and no representative of the decedent appears by the tenth day of the second term next succeeding the suggestion, and no measures are taken within that time by the opposite party to compel the appearance of a representative, the case abates. (Rules Supreme Ct. Rule, 15; Dest. Fed. Proc. 255; 6 Wheat. v; 1 Pet. ix; 13 How. v; Dest. Fed. Proc. 255-'6; 6 Wheat. 260; Hook v. Linton, 10 Pet. 107; McKinney v. Carroll, 12 Pet. 71; Phillips v. Preston, 11 How. 294; Barribeau v. Brent, 17 How. 46.)

Provision is made in like manner by the rules of the supreme court for the case where when the appellant from the circuit court sues out his appeal, the opposite party is dead, and has no proper representative within the jurisdiction of the circuit court, but has one in some state or territory of the United States, for which reference must be had to the rule itself. (Rules Supreme Ct. Rule, 15; 20 Wal. xv; Dest. Fed. Proc, 256.)

#### 5°. The Hearing in the Supreme Court.

No notice of hearing is required as to cases on the docket. But of any special motion not on the docket, reasonable notice must be given to the opposite party, with copies of the papers to be used on the motion. (Ben. Adm § 610.)

For any irregularity in the appeal, for insufficiency of amount, for palpable want of jurisdiction, or for any reason why the cause should not be heard on appeal, it is the practice to make a special motion to *dismiss the appeal*, without waiting for the call of the cause in its order on the docket. But where an appeal has been dismissed through mistake, it may be reinstated, or a new appeal may be taken within the time limited by law for appeals. (Ben. Adm. § 611; Bevens v. Ramsey. 11 How. 185; Stafford v. Union Bank, 16 How. 135; Carroll v. Dorsey, 20 How. 206; Herker v. Fowler, 1 Bl. 95; The Palmyra, 12 Wheat. 1; U. States v. Parker, 20 How. 261; Rogers v. Law, 21 How. 526.)

On the second day in each term, the court commences to call the cases for argument, in the order in which they stand

on the docket, and so proceeds during the term. If the parties, or either of them, shall be ready when the case is called it will be heard; and if neither party is ready the cause goes to the foot of the docket, unless some satisfactory reason to the contrary is shown. No cause, save those of general public interest, is taken up out of its order, or set down for any particular day, except under special and peculiar circumstances, to be shown to the court. (Rules of Supreme Court, Rule 26; Dest. Fed. Proc. 264-'5.)

Only two counsel can be heard for each party, and no more than two hours are allowed on each side for the argument without leave of the court, granted before the argument begins. The counsel for the appellant opens and concludes the case. Counsel for the appellant is required to file with the clerk, at least six days before the case is called for argument, twenty copies of a printed brief, one to be furnished on application to each of the opposing counsel. The brief must contain a concise statement of the case, a specific assignment of the errors relied upon, a short statement of the argument, exhibiting clearly the points of law or fact to be discussed, with a reference to the authorities relied on, the objections, if any, to the charge of the court, and a specification of the full substance of the evidence admitted or rejected. Counsel for the appellee is to file a similar brief *mutatis mutandis*. Without such assignment of errors counsel will not be heard, nor any error regarded, except at the pleasure of the court. (Rules Supreme Ct., Rule 21; Dest. Fed. Proc. 259 & seq.)

If the counsel on both sides choose to submit printed arguments within the first ninety days of the term, the court will receive them without regard to the number of the case on the docket. Upon the calling of the case in its order, a printed argument filed is equivalent to an appearance by counsel. But when a case is taken up for trial upon the regular call of the docket, and argued orally in behalf of only one of the parties, no printed argument will be received unless filed before the argument begins, but the court will proceed to consider and decide the case upon the *ex-parte* argument. No brief or argument will be received after a case has been argued and submitted, except upon special leave of court, granted after notice to the adversary. (Rules Supreme Ct., Rule 22; Dest. Fed. Proc. 258-'9, 261.)

6°. The Decree of the Supreme Court.

When the sentence of the court below is affirmed, it is in the discretion of the court to allow further damages by way of interest or not, so that in admiralty no interest accrues on the decree of the lower court, unless specially directed. (Rules Supreme Ct. Rule 23; *Hemmenway v. Fisher*, 20 How. 258 & seq; Dest. Fed. Proc. 262.) In cases of affirm-

ance, costs are always allowed the appellee, unless otherwise ordered by the court, as they are also in cases of dismissal, except for want of jurisdiction, unless otherwise agreed by the parties. In cases of reversal, costs are allowed to the appellant, unless otherwise ordered. But no costs are ever allowed *against the United States*. (Rules Supreme Ct. Rule 24; 12 Pet. vii; 1 Wal. v; Dest. Fed. Proc. 262-'3.)

Subject to these general limitations, costs and counsel-fees are in the discretion of the court; nor does the appellate court in general interfere with the discretion exercised by the court below in these particulars. (Ben. Adm. § 616; *Canter, &c. v. Am. Ins. Co.* 3 Pet. 319; *United States v. the Malek Adhel*, 2 How. 237; *The Peterhoff*, 5 Wal. 61-'2; *Post v. Jones*, 19 How. 161; *The Mary*, 9 Cr. 126.)

The court does not, however, always simply affirm or reverse the decree below, but often modifies it, or makes a new decree, such as the court below should have made. (Ben. Adm. § 616; *Penhallow v. Doane*, 3 Dal. 54.)

When the supreme court is equally divided, as the question is shall the decree be reversed, if a majority of the judges are not in favor of reversal, the decree of the court below stands affirmed. (Ben. Adm. § 616; *The Antelope*, 10 Wheat. 66; *Etting v. Bank of United States*, 10 Wheat. 59; *Washington Bridge Co. v. Stewart*, 3 How. 424.)

7°. The *Remittitur* and Mandate to the Court Below.

After the cause has been heard and decided in the supreme court on appeal, whether it be to dismiss, or to affirm, or reverse, that court having no power itself, for the most part, to enforce its sentences, issues its *remittitur* and mandate to the circuit court, or if the cause came up from a district court, to that court, directing the decree to be entered and executed as an original decree of the court below. And this mandate it is the duty of the clerk of the supreme court *ex officio* to issue. (Ben. Adm. § 598, 616; Rules Supreme Ct. Rule 24; 12 Pet. vii; Dest. Fed. Proc. 263-'4.)

When the court below is supposed to err in executing this mandate, an appeal may be taken to correct the error, and the supreme court will then construe the meaning thereof. But upon such appeal nothing is before the court but the proceedings subsequent to the mandate. (Ben. Adm. § 617; *Himeley v. Rose*, 5 Cr. 313; *Canter v. Am. Ins. Co.* 1 Pet. 511; *The Santa Maria*, 10 Wheat. 431; *Sibbald v. U. States*, 12 Pet. 488; *Walden v. Bodley*, 9 How. 48; *Corning v. Troy Iron, &c.*, Fact. 15 How. 466; *Perkins v. Fourniquet*, 14 How. 333; *Roberts v. Cooper*, 20 How. 466; *The Lady Pike*, 6 Otto, (96 U. S.) 462.)

# APPENDIX.





# APPENDIX

TO

## THE PRACTICE OF THE LAW IN CIVIL CASES,

CONTAINING

### FORMS USED IN CIVIL PRACTICE.

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#### 1. *Single Bill by one Obligor.*—(*Ante*, p. 19.)

\$1000.

On demand, [or “— months after date,” &c., as the case may be,] I bind myself and my heirs to pay to O. C. one thousand dollars, in gold. Witness my hand and seal, this — day of —, 18—.

D. D. [SEAL.]

#### 2. *Joint Single Bill by two Obligors.*

\$1000.

On demand, [or “— months after date,” &c., as the case may be,] we bind ourselves and our heirs to pay to O. C. one thousand dollars, in gold. Witness our hands and seals, this — day of —, 18—.

D. D. [SEAL.]

S. S. [SEAL.]

#### 3. *Joint and Several Single Bill by two Obligors.*

\$1000.

On demand, [or “— months after date,” &c., as the case may be,] we bind ourselves and our heirs, jointly and severally, to pay to O. C. one thousand dollars in gold. Witness our hands and seals, this — day of —, 18—.

D. D. [SEAL.]

S. S. [SEAL.]

#### 4. *Penal Bill or Bond.*—(*Ante*, p. 19.)

\$1000

2

2000

On demand, [or “— months after date, &c., as the case may be,] I bind myself and my heirs to pay to O. C. one thousand dollars in gold, in the penalty of two thousand dollars in gold. Witness my hand and seal, this — day of —, 18—.

D. D. [SEAL.]

#### 5. *Bond with Condition to Pay Money.*—(*Ante*, p. 20.)

\$1000

2

2000

I bind myself and my heirs to pay to O. C. two thousand dollars in gold. Witness my hand and seal, this — day of —, 18—.

The condition of the above obligation is such that whereas I am bound unto the said O. C. in the sum of one thousand dollars in gold, to be paid

to the said C. C. on or before the — day of —, in the year 18—; now if I shall pay to the said C. C. the said sum of one thousand dollars in gold on or before the day and year aforesaid, the above obligation is to be void, otherwise to remain in full force and virtue.

D. D. [SEAL.]

6. *Bond with Condition to Pay Money by Principal and Surety.*

\$1000

2 We bind ourselves and our heirs to pay to C. C. two thousand dollars  
in gold. Witness our hands and seals, this — day of —, 18—.

2000 The condition of the above obligation is such that, whereas D. D. is bound unto the said C. C. in the sum of one thousand dollars, to be paid to the said C. C. in gold, on or before the — day of —, in the year 18—; now if the said D. D. shall pay to the said C. C. the said sum of one thousand dollars in gold on or before the day and year aforesaid, the above obligation is to be void, otherwise to remain in full force and virtue.

D. D. [SEAL.]

S. S. [SEAL.]

7. *Promissory Note, not Negotiable.*—(Ante, p. 20.)

\$1000.

On demand, [or “— months after date,” &c., as the case may be,] I promise to pay to C. C. one thousand dollars in gold, for value received. Witness my hand and seal, this — day of —, 18—.

D. D.

8. *Foreign Bill of Exchange.*—(Ante, p. 22.)

\$1000.

CHARLOTTESVILLE, VA., October —, 18—.

At sight, [or “— days after sight,” &c., as the case may be,] of this my first of exchange [second and third of same tenor and date not paid,] pay to C. C. or order, [or “to bearer,”] on thousand dollars in gold, value received, and charge the account of—

Your obt. St.

D. D.

To A. A., Esq., Montreal, Canada.

9. *Inland Bill of Exchange.*—(Ante, p. 22.)

\$1000.

CHARLOTTESVILLE, VA., October —, 18—.

At sight, [or “— days after sight,” &c., as the case may be,] pay to C. C. or order, [or “to bearer,”] one thousand dollars in gold, value received, and charge to account of—

Your obt. St.

D. D.

To A. A., Esq., Richmond, Va.

10. *Note Negotiable.*—(Ante, p. 23.)

\$1000.

CHARLOTTESVILLE, VA., October —, 18—.

— days after date, for value received, I promise to pay to C. C., or order, [or “to bearer,”] one thousand dollars in gold, negotiable and payable, without offset, at the First National Bank, Richmond, Virginia.

The maker and endorsers hereof waive the benefit of their homestead exemption as to this note.

D. D.

11. *Arbitration Bond.*—(Ante, p. 25)

Know all men that I, D. D., am held and firmly bound unto C. C. in the sum of — dollars in gold, to be paid to the said C. C., for which payment I bind myself

and my heirs by these presents. Sealed with my seal, and dated this — day of —, in the year 18—.

The condition of the above obligation is such that if the above-bound D. D., his executors and administrators, shall for his and their part, in and by all things, well and truly observe, perform, and keep the award and determination of Z, Y, and X, or any two of them indifferently chosen by the said C. C. and D. D. to arbitrate, award, and determine concerning all manner of actions, and causes of action, suits, bonds, contracts, covenants, promises, accounts, reckonings, judgments, executions, controversies, trespasses, damages, and demands whatsoever, both in law and in equity, at any time heretofore had, moved, sued, prosecuted, done, suffered, or committed by or between the said parties, so as the award of the said arbitrators [where there are three or more arbitrators, say "or any two of them,"] be made and set down in writing under their hands and seals, [or the hands and seals of any two of them,] ready to be delivered to the said parties in difference, on or before the — day of —, 18—, (\*) then this obligation shall be void, otherwise to remain in full force and virtue.

D. D., [SEAL.]

*When, in the event of the arbitrators disagreeing, the award is to be made by an umpire,—follow the foregoing form to the (\*), and then say:*

And if the said arbitrators shall not make such their award of and concerning the premises within the time limited as aforesaid, then if the said D. D., his executors and administrators, for his and their part do and shall well and truly observe, perform, and keep the award, determination, and umpirage of R. S. (being a person indifferently chosen by the said parties for umpire,) in and concerning the premises, so as the said umpire do make and set down his award and umpirage in writing, under his hand and seal, ready to be delivered to the said parties in difference, on or before the — day of —, 18—, then this obligation shall be void, &c.

*When the award is to be made a rule of court,—follow the foregoing form to the (\*), and then say:*

And it is hereby agreed by and between the said parties, that these presents, and the submission hereby made of the said matters in controversy, shall be made a rule of the — court of the county [or corporation] of —, to the end that the said parties in difference shall be finally concluded by the said arbitration and award in pursuance of these presents, according to the statute in that case made and provided.

### 12. Title Bond.—(Ante, p. 25.)

Know all men that I, D. D., am held and firmly bound unto R. P. in the sum of — dollars, to be paid to the said R. P., his heirs, personal representatives, or assigns, in gold. For the payment whereof I bind myself and my heirs firmly by these presents. Sealed with my seal, and dated this — day of —, in the year 18—.

The condition of the above obligation is such that whereas the above-bound D. D. has agreed to sell and convey to the said R. P., possession to be given immediately, a tract or parcel of land called —, lying in — county, estimated to contain — acres, be the same, however, ever so much more or less, and bounded as follows:

[State the boundaries.]

for which the said R. P. has agreed to pay to the above-bound D. D., the sum of — dollars, in — equal annual instalments of — dollars each, the first to be due and payable on the — day of —, in the year 18—, and the re-

mainder of the said instalments to be paid severally, on the same day, annually, in each successive year thereafter, for ——— years; and whereas it is agreed by and between the said parties, that after the payment to the above-bound D. D. by the said R. P., of the ——— of the said instalments, the above-bound D. D. shall and will immediately thereupon convey the premises aforesaid, with all the appurtenances thereunto belonging, by good and sure title, in fee-simple, to the said R. P., his heirs and assigns, by sufficient deed of conveyance, with proper and usual covenants of title against the claim of all persons. Now, if the above-bound D. D. shall well and truly, and according to the true intent and meaning hereof, perform and satisfy each and all of the stipulations aforesaid, in his part to be performed and satisfied, so that no default therein, nor in any part thereof, on his part shall occur, and until the conveyance aforesaid of the said premises, shall be made as aforesaid, shall permit the said R. P., his heirs and assigns, peaceably and quietly to possess, hold and enjoy the premises aforesaid, with the appurtenances thereunto belonging, without let or hindrance, then the above obligation to be void, or else to remain in full force and virtue.

D. D. [SEAL.]

### 13. *Sheriff's Bond.*—(Ante, p. 26.)

Know all men that we, D. D., J. S., R. S., and S. S. are held and firmly bound unto the Commonwealth of Virginia, in the sum of ——— dollars, to be paid to the said Commonwealth. For the payment whereof, we bind ourselves and our heirs, jointly and severally, by these presents. Sealed with our seals, and dated this ——— day of ——— of ———, in the year of our Lord, 18 —.

The condition of the above obligation is such that whereas the above-bound D. D. has been duly elected by the qualified voters of the county of ———, Sheriff of the said county, to serve as such sheriff, within the said county, for the term of four years, from the first day of July, in the year of our Lord, 18 —. Now, if the said D. D. shall faithfully discharge, according to law, the duties of his said office of sheriff, in the said county of ———, during his continuance in the said office, then the above obligation to be void; otherwise to remain in full force and virtue.

D. D. [SEAL.]

J. S. [SEAL.]

R. S. [SEAL.]

S. S. [SEAL.]

### 14. *Constable's Bond.*—(Ante, p. 26.)

Know all men, &c., [as in No. 13.]

The condition of the above obligation is such that whereas the above-bound D. D. has been duly elected by the qualified voters of ——— magisterial district of ——— county, to serve as constable for the said district, for the term of two years, from the first day of July, in the year of our Lord, 18 —. Now, if the said D. D. shall faithfully discharge, according to law, the duties of his said office of constable for the said district, during his continuance in such office, then the above obligation to be void; otherwise to remain in full force and virtue.

D. D. [SEAL.]

S. S. [SEAL.]

### 15. *Bond of Sergeant of Corporation.*—(Ante, p. 26.)

Known all men, &c., [as in No. 13.]

The condition of the above obligation is such that whereas D. D. has been duly elected by the qualified voters of the city [or town] of ———, to serve as city

[or town] sergeant in and for the said corporation, for the term of two years, from the first day of July, in the year of our Lord, 18 —. Now, if the said D. D. shall faithfully discharge, according to law, the duties of his said office of city [or town] sergeant, in and for the corporation aforesaid, during his continuance in such office, then the above obligation to be void ; otherwise to remain in full force and virtue.

D. D. [SEAL.]

S. S. [SEAL.]

16. *Guardian's Bond.*—(*Ante*, p. 27.)

Know all men, &c., [as in No. 13.]

The condition of the above obligation is such, that whereas the above-bound D. D. hath this day, by the county [or corporation] court of — county [or corporation] been appointed guardian of W. W., orphan of C. W., deceased ; if, therefore, the said D. D. shall faithfully discharge the duties of the said trust, and at the expiration thereof shall deliver and pay all the estate and money in his hands, or with which he is chargeable by reason of such trust, to those entitled thereto, then the above obligation to be void, otherwise to remain in full force and virtue.

D. D. [SEAL.]

S. S. [SEAL.]

17. *Bond of Executor or Administrator.*—(*Ante*, p. 27.)

Know all men, &c., [as in No. 13.]

The condition of the above obligation is such, that if the above-bound D. D., as executor of the last will and testament, [or "as administrator"] of R. N., deceased, shall faithfully discharge the duties of the said trust, then this obligation is to be void, otherwise to remain in full force and virtue.

D. D. [SEAL.]

S. S. [SEAL.]

18. *Refunding Bond.*—(*Ante*, p. 27.)

Know all men that we, D. D., J. S., and R. S. are held and firmly bound unto E. E., executor of the last will and testament [or "administrator"] of X. Y., deceased, in the sum of — dollars, to be paid to the said E. E., his executors or administrators, in gold. For the payment whereof, we bind ourselves and our heirs jointly and severally, by these presents. Sealed with our seals, and dated this — day of —, in the year of our Lord, 18—.

The condition of the above obligation is such, that whereas by the will of the said X. Y., deceased, a legacy of — dollars was bequeathed to the above-bound D. D., [or "whereas the said D. D. is entitled to — dollars, as his distributive share of the personal estate of the said deceased"], which has this day been paid to him by the said E. E. Now if the said D. D. shall refund due proportions of any debts or demands which may hereafter appear against the estate of the said X. Y., and the costs attending the recovery of such debts, then the above obligation to be void, otherwise to remain in full force and virtue.

D. D. [SEAL.]

S. S. [SEAL.]

19. *Indemnifying Bond.*—(*Ante*, p. 27.)

Know all men that we, C. C. and J. S., are held and firmly bound unto L. M., sheriff of the county of A, [or "sergeant of the corporation of A"], in the sum of — dollars, [a penalty double the value of the property levied upon]; To

the payment whereof, to be made to the said L. M., sheriff, as aforesaid, in gold, we bind ourselves and our heirs jointly and severally by these presents. Sealed with our seals, and dated this — day of —, in the year of our Lord, 18—.

The condition of the above obligation is such, that whereas the above-bound O. C., upon a judgment obtained by him in the — court of the county [or "corporation"] of A, against D. D., has sued out a writ of *feri facias* for taking the goods and chattels of the said D. D., to satisfy the said O. C., the sum of — dollars, with interest thereon, after the rate of — per centum per annum, from the — day of —, 18—, until paid, and — dollars costs, which writ is directed to the sheriff of the said county [or "sergeant of the said corporation"] of A; and J. B., deputy for L. M., sheriff of the said county [or "sergeant of the said corporation,"] has levied the said execution on the following property, to-wit, [specify it]: and a doubt arising whether the said property is liable to such levy, the said sheriff has applied to the said O. C. for an indemnifying bond, according to the statute in such case. Now, if the said O. C. and J. S., or their heirs or personal representatives, shall indemnify the said L. M., sheriff [or "sergeant"] as aforesaid, against all damages which he may sustain in consequence of the seizure or sale of the property on which the said execution hath been levied; and shall moreover pay and satisfy to any person or persons claiming title to the said property, all damages which such person or persons may sustain in consequence of such seizure and sale; and shall also warrant and defend to the purchaser or purchasers of the said property such interest and estate therein as shall be sold under the said execution, then the above obligation to be void, otherwise to remain in full force and virtue.

O. C. [SEAL.]

J. S. [SEAL.]

## 20. *Delivery or Forthcoming Bond.*—(Ante, p. 28.)

Know all men that we, D. D. and J. S., are held and firmly bound unto O. C., in the sum of — dollars, [the penalty double the value of the goods levied upon], to the payment whereof, to be made to the said O. C., in gold, we bind ourselves and our heirs jointly and severally by these presents. Sealed with our seals, and dated this — day of —, in the year of our Lord, 18—.

The condition of the above obligation is such, that whereas the above-named O. C., upon a judgment obtained by him in the — court of the county [or "corporation"] of A, against the above-bound D. D., hath sued out of the said court a writ of *feri facias* for taking the goods and chattels of the said D. D., directed to the sheriff of the county [or "sergeant of the corporation"] of —, which writ, with the legal costs attending, the same amounts to the sum of — dollars. And whereas J. B., deputy for L. M., sheriff of the said county [or "sergeant of the said corporation"] of —, by virtue of the said writ, hath taken the following property belonging to the said D. D. to satisfy the same, to-wit: [Insert the property levied on.] And the said D. D. being desirous to keep the same in his possession, and at his risk, until the day of sale thereof, hath tendered the above-bound J. S. as security for the forthcoming and delivery thereof, on the day and at the place of sale. Now, if the said D. D. shall deliver the said goods and chattels to the said L. M., sheriff of the said county [or "sergeant of the said corporation"] of —, or one of his deputies, at the courthouse of the said county [or "corporation"] on the first day of the next — term of the county [or "corporation"] court for the said county [or "corporation"] of —, [or whatever other time and place may be appointed by

*the officer for the sale*], then and there to be sold to satisfy the said execution, then the above obligation to be void, otherwise to remain in full force and virtue.

D. D. [SEAL.]

J. S. [SEAL.]

21. *Recognizance in Court.*—(*Ante*, p. 28.)

The said D. D. and J. S. here in court acknowledge themselves to be indebted to the Commonwealth of Virginia in the sum of ——— dollars each, of their respective goods and chattels, lands and tenements, to be levied, and for the use of the Commonwealth rendered. Yet upon this condition, that if the said D. D. shall personally appear here before the judge of this court on the first day of the next term to answer an indictment to be then preferred against him for [describe the offence], and shall not depart thence without the leave of the said court, then this recognizance is to be void.

22. *Recognizance before a Justice of the Peace.*—(*Ante*, p. 28.)

Virginia,

County [or "corporation"] of A, to-wit :

Be it remembered, that on this ——— day of ———, in the year 18—, D. D. and J. S. came before me, W. R., a justice of the peace, in and for the said county, and acknowledged themselves severally to owe to the Commonwealth of Virginia, that is so say, the said D. D. the sum of ——— dollars, and the said J. S. the sum of ——— dollars, of their respective goods and chattels, lands and tenements, to be levied, and for the use of the Commonwealth rendered. Yet upon this condition, that if the said D. D. shall keep the peace and be of good behavior towards all the citizens of this Commonwealth, and especially towards C. C., for and during the term of one year, [*or for such less time as the justice shall direct*], from the date hereof, then this recognizance shall be void, otherwise to remain in full force and virtue.

Acknowledged before me the day and year first above written.

W. R., J. P.

D. D.

J. S.

23. *General Form of Collateral Agreement.*

(*Ante*, p. 28 ; Grayd. Forms, 26.)

Articles of agreement entered into this ——— day of ——— in the year 18—, between C. C. of ——— of the one part, and D. D. of ——— of the other part: Witnesseth, that the said C. C., for the consideration hereinafter mentioned, doth covenant and agree with the said party of the second part, that he, the said party of the first part, shall and will, &c. [*Insert the contract on C. C.'s part*]

And the said party of the second part doth covenant and agree on his part, for the consideration hereinbefore mentioned, that he, the said party of the second part, shall and will, &c. [*Insert the contract on D. D.'s part.*]

And for the faithful performance of the covenants and agreements aforesaid, the parties aforesaid do hereby respectively bind themselves and their heirs, each to the other, in the sum of ——— dollars, in gold.

Witness our hands and seals, the day and year first above written.

C. C. [SEAL.]

D. D. [SEAL.]



24. *Collateral Agreement for Sale of Land.*

(Ante, p. 28; Tate's Forms, 29.)

Articles of agreement entered into this — day of — in the year 18—, between C. C. of —, of the one part, and D. D. of —, of the other part: Witnesseth, that the said C. C., for and in consideration of the sum of — dollars in gold, to be paid by the said D. D., pursuant to the covenant and agreement of the said D. D. hereinafter mentioned, doth, for himself and his heirs, covenant and agree with the said D. D., and his heirs and assigns, that he, the said C. C. and his heirs, shall and will, on or before the — day of —, 18—, make out a complete title in fee-simple to, and by such conveyances, assurances, ways and means in law, as the said D. D., his heirs and assigns, or his or their counsel learned in the law shall reasonably devise, advise, or require, convey, release, and assure in possession and enjoyment, to the said D. D., and his heirs or assigns forever, free from all manner of incumbrances, claims and demands whatsoever, and with usual and proper covenants of title, all that tract or parcel of land, with its appurtenances, lying, &c. [*Describe the land as definitely and particularly as may be.*]

And the said D. D., in consideration of the covenant and agreement hereinbefore contained, on the part of the said C. C., doth for himself and his heirs, covenant and agree with the said C. C., that the said D. D., and his heirs and assigns, shall and will, upon the making and executing of such conveyances and assurances as aforesaid, pay to the said C. C. or his assigns, the sum of — dollars in gold.

Witness the hands and seals of the said parties, the day and year first above written.

C. C. [SEAL.]

D. D. [SEAL.]

25. *Another Form of Agreement for Sale of Land.*

Articles of agreement entered into this — day of —, in the year 18—, between C. C. of —, of the one part, and D. D. of —, of the other part: Witnesseth, that the said C. C., for and in consideration of the sum of — dollars in gold, to be paid in sundry instalments by the said D. D., pursuant to the covenant and agreement of the said D. D., hereinafter mentioned, doth for himself and his heirs, covenant and agree with the said D. D. and his heirs and assigns, that the said C. C. and his heirs shall and will immediately, upon the payment of the said first instalment by the said D. D. or his assigns, make out a complete title in fee-simple to, and by such conveyances, assurances, ways and means in law, as the said D. D., his heirs or assigns, or his or their counsel learned in the law, shall reasonably devise, advise, or require, convey, release, and assure in possession and enjoyment, to the said D. D., and his heirs or assigns forever, free from all manner of incumbrances and demands whatsoever, and with usual and proper covenants of title, all that tract or parcel of land, with its appurtenances, lying, &c. [*Describe the land as definitely and particularly as may be.*]

And the said D. D., in consideration of the covenant and agreement hereinbefore contained, on the part of the said C. C., doth for himself and his heirs, covenant and agree with the said C. C., that the said D. D. and his heirs or assigns, shall and will, on or before the — day of — 18—, pay to the said C. C., or his assigns, in gold, the sum of — dollars, as the first instalment of the purchase-money for the said land; and that the said D. D. and his heirs or assigns, shall and will pay the residue of the said purchase-money, namely: the

sum of ——— dollars, in gold, in three equal annual instalments, each bearing interest after the rate of ——— per centum per annum, from the date last aforesaid until paid, that is to say, ——— dollars on the ——— day of ———, 18—, ——— dollars on the ——— day of ———, 18—, and ——— dollars on the ——— day of ———, 18—.

Witness the hands and seals of the said parties, the day and year first above written.

C. C. [SEAL.]

D. D. [SEAL.]

## 26. *Another Form of Agreement for Sale of Land.*

(*Ante*, p. 28; Grayd. Forms, 48.)

MEMORANDUM, that it is agreed between C. C. of the one part, and D. D. of the other part; that the said C. C. shall, on or before the ——— day of ———, 18—, make out a good title in fee-simple to, and by good and sufficient conveyances in law, with proper and usual covenants of title, pass and assure to the said D. D. and his heirs, free from all incumbrances, claims and demands whatsoever, all that parcel or tract of land, with its appurtenances, lying, &c. [*Describe the premises as definitely and particularly as may be.*] And that the said C. C. will not henceforth remove any trees, shrubbery, flowers, mantles, shelves, locks, bolts, bars, furnaces, stoves, grates, ranges, brackets, chandeliers, or any fixture whatsoever now annexed and belonging to the said premises, but will suffer them to pass with the same to the said D. D., his heirs and assigns. And that the said D. D. shall receive the rents of the said premises accruing from and after the ——— day of ———, 18—. And the said C. C. shall pay all arrears of taxes and assessments up to that date.

In consideration whereof the said D. D., for himself and his heirs and assigns, doth agree to pay to the said C. C., upon the executing of the conveyances as aforesaid, the sum of ——— dollars in gold.

And it is further agreed between the said parties, that the said D. D. shall be at the charge of the deeds for conveying to him the said premises; and that all attested copies of title-deeds and covenants to produce the same, shall be at the charge of the said C. C.

Witness the hands and seals of the parties this ——— day of ——— in the year 18—.

C. C. [SEAL.]

D. D. [SEAL.]

As agreements to convey lands for an estate of inheritance, or of freehold, or for a term exceeding five years, are void as to creditors, and subsequent purchasers for valuable consideration, without notice, until and except from the time that they are duly admitted to record in the county or corporation, wherein the property is (V. C. 1873, c. 114, § 5; Acts 1876-'7, c. 48; *Ante*, p. 542; 2 Insts. Com. & Stat. Law, 849 & seq.) the form of certificate of acknowledgment for that purpose is annexed. The officers before whom the acknowledgment may be made are stated V. C. 1873, c. 117, § 2 & seq; 2 Insts. Com. & Stat. Law, 861 & seq.

## 27. *Certificate of Acknowledgment of a Writing for Registry.*

(2 Insts. Com. & Stat. Law, 861 & seq; V. C. 1873, c. 117 § 2, 8; *Post*, Form 41.)

Virginia, [or other State],

County [or corporation] of ———, to-wit:

I, ———, a justice of the peace, [or commissioner in chancery of the ——— court, or notary public], for the county [or corporation] of ———, in the State

[or territory or district] of ———, do certify that C. C. and D. D., whose names are signed to the writing above [or hereto annexed], bearing date on the ——— day of ———, 18—, have acknowledged the same before me, in my county [or corporation] aforesaid. Given under my hand, this ——— day of ———, in the year of our Lord, 18—.

W. R., J. P.

## 28. *Agreement for Building a House.*

(Grayd. Forms, 48; Tate's Forms, 42.)

Be it remembered, that on this ——— day of ———, 18—, it is agreed between C. C., of ———, and D. D., of ———, in manner and form following, to-wit: The said D. D., for the considerations hereinafter mentioned, doth, for himself and his heirs, covenant and agree with the said C. C. and his assigns, that the said D. D. shall and will, within the space of ——— months next after the date hereof, in good and workmanlike manner, and with proper art, judgment and skill, at ———, well and substantially, erect, build, set up and finish, one house or messuage, according to the draft or scheme hereunto annexed, of the dimensions and description following, to-wit: [*Describe it.*] And to compose the said house or messuage with such stone or brick, timber and other materials, as the said C. C. or his assigns shall find and provide for the same. And the said D. D., for himself and his heirs, doth covenant and agree that he will pay to the said C. C., or his assigns, as and for stipulated or liquidated damages, ——— dollars for each and every day that the said house or messuage shall remain and be unfinished after the lapse of the said period of ——— months next after the date hereof.

And the said C. C., in consideration thereof, doth, for himself and his heirs, covenant and agree with the said D. D., to pay to the said D. D. or his assigns, in gold, the sum of ——— dollars, in manner following, to-wit: ——— dollars, part thereof at the beginning of the said work, ——— dollars more, another part thereof, when the said house shall have been completely roofed, and the remaining ——— dollars in full for the said work, when the same shall be completely finished. And also, that the said C. C., or his assigns, shall and will, at his or their own proper expense and charges, find and provide all the stone, bricks, timber, shingles, and other materials necessary for making and building the said house.

Witness the hands and seals of the parties the day and year first above-written.

C. C. [SEAL.]

D. D. [SEAL.]

☞ Certificate of acknowledgment for registry, in order to secure mechanic's lien, pursuant to V. C. 1873, c. 115, § 2, is like that in Form 41.

## 29. *Agreement for the Erection of Buildings.*—(Tate's Forms, 40.)

Articles of agreement entered into this ——— day of ———, in the year 18—, between D. D., of ———, of the one part, and C. C., of ———, of the other part: Witnesseth that the said D. D., for himself and his heirs, doth covenant and agree with the said C. C. and his assigns, that the said D. D. shall and will, on or before the ——— day of ———, 18—, for the considerations hereinafter mentioned, in good and workmanlike manner, and with proper art, judgment, and skill, erect, build, set up and finish, upon the lot belonging to the said C. C. in the city of ———, known in the plan of said city as lot number ———, the several edifices and buildings set forth in the schedule, proposal, or estimate hereunto annexed; and also that the said D. D. shall and will execute all and singular the works mentioned in said schedule, as therein described and set down, in a good, workmanlike, and

substantial manner, with all proper art, judgment, and skill. And that all the said buildings, erections, and works shall be executed, done, and finished to the good-liking and satisfaction of —, or any other person whom the said C. C. shall for that purpose name and appoint, to be testified by a certificate in writing under the hand of the said —, or other person as aforesaid. And that the said D. D. shall and will find and provide good, proper, and sufficient materials of all kinds whatsoever, and of the best quality, for erecting and completely finishing the said buildings, edifices, erections, and works.

And the said C. C., for himself and his heirs, doth covenant and agree with the said D. D. and his assigns, that the said C. C., or his assigns, shall and will pay to the said D. D. or his assigns, within — days next after the said buildings, edifices, erections, and works shall be completely built, erected, done, and finished as aforesaid, the sum of — in gold.

And it is agreed between the said parties, that in case the said C. C. or his assigns shall direct any more or other work to be done in or about the said buildings, works, and premises, than what is contained and specified in the said schedule hereunto annexed, the said C. C. or his assigns shall and will pay to the said D. D. or his assigns so much money in gold as such extra work shall be worth upon a reasonable valuation; and in case the said C. C. or his assigns shall think fit to diminish or omit any part of the work specified in the said schedule hereunto annexed, then the said D. D. or his assigns shall and will deduct and allow out of the money aforesaid agreed to be paid him for the work aforesaid, so much money in gold as the work so to be diminished or omitted shall amount to upon a reasonable valuation.

And for the performance of all and each of the articles and stipulations above mentioned, the said C. C. and D. D. do bind themselves and their heirs and assigns, each to the other, in the penal sum of — dollars.

Witness the hands and seals of the parties, the day and year above written.

C. C. [SEAL.]

D. D. [SEAL.]

☞ Certificate of acknowledgment for registry, in order to secure mechanic's lien, pursuant to V. C. 1878, c. 115, § 2, is like that in Form 41.

### 30. *Agreement with a Clerk.*—(Grayd. Forms, 47.)

It is agreed this — day of —, 18—, between C. C. and D. D., both of the city of —, and State of —, in manner following, to-wit: The said D. D. covenants and agrees faithfully, truly and diligently to write for and act as the clerk and salesman of the said C. C. for the space of one year from the date hereof, if so long both parties live, without absenting himself from the same; during which time the said D. D. will resort to the office, store or place of business of the said C. C. and there attend, and do and perform all the duties and offices pertaining to the function of clerk and salesman aforesaid, without revealing any of the secrets of the said C. C., his occupation or business.

In consideration of which service, so to be performed by the said D. D., the said C. C. covenants and agrees to find and provide for the said D. D., during the said year, sufficient lodging and maintenance, and to allow and pay to the said D. D. the sum of — dollars in gold, by the year, by four equal quarterly payments, or oftener, if required.

But when and as often as the said C. C. has not writing or other business to keep the said D. D. fully employed, then and so often during such time, it shall be lawful for the said D. D. to do any other business for his own use, on his own

account; and if it happen that the said D. D. fall sick, or shall be absent from the place of business and the employment of the said C. C. when he has employment for the said D. D., then such time of absence shall be deducted, allowed for, and made up to the said C. C.

Witness the hands and seals of the parties, the day and year first above-written.

C. C. [SEAL.]

D. D. [SEAL.]

31. *Articles of General Partnership.*—(*Grayd. Forms, 56.*)

Articles of agreement entered into this — day of —, in the year of our Lord, 18—, between C. C. of the one part, and D. D. of the other part, both of the city of — in the State of —: Witnesseth as follows, namely:

1. The said C. C. and D. D. agree to become co-partners together in the art or trade of painting, and all things thereto belonging, and also in buying, selling and retailing all sorts of wares, goods and commodities, belonging to the said trade of painting; which said co-partnership is to continue for and during, and to the full end and term of — years, from the date hereof next ensuing:

2. The said parties agree that each shall contribute as stock the sum of — dollars, (the payment of which by both this day is hereby acknowledged,) to be used, laid out and employed in common between them, for the management of the said trade of painting, to their utmost benefit and advantage.

3. The said co-partners shall not, nor will at any time hereafter, use, exercise or follow, the said trade of painting, or any other trade or employment whatsoever, during the said term, to their several and private benefit and advantage; but shall and will, at all times during the said term, (if they shall so long live), each do his best and utmost endeavors, in and by all means possible, to the utmost of his skill and power, for their joint interest, profit and advantage; and truly employ, buy, sell and trade with the stock as aforesaid, and the increase thereof in the trade of painting aforesaid, without any sinister intention or fraudulent endeavors whatsoever.

4. The said co-partners shall and will, from time to time, and at all times hereafter, during the said term, pay, bear and discharge equally between them, the rent of the shop to be hired or rented for the conducting of the trade of painting aforesaid; and also shall and will defray, in equal proportions, from time to time, and at all times, all the expenses and charges of every kind attending the exercise of the said trade of painting.

5. The said co-partners shall, from time to time, during the said term, equally divide between them share and share alike, all such gain, profit and increase as shall come, grow, arise, or accrue from or by reason of the said trade or joint business; and also, that all such losses as shall happen in the said joint trade by bad debts, ill commodities, or otherwise, without fraud or covin, shall be paid and borne equally and proportionably between them.

6. There shall be had and kept at all times during the said term, and joint business and co-partnership aforesaid, perfect, just and true books of accounts, wherein each of the said co-partners shall duly enter and set down, as well all money by him received, paid, expended, and laid out in and about the management and business of the said trade, as also all wares, goods, commodities, and merchandize by them, or either of them, bought and sold or otherwise acquired and disposed of, by reason or means, or upon account or in the business of the said co-partnership, and all other matters and things whatsoever to the said joint-trade or business, and the management thereof, in any wise belonging or appertaining, which said books shall be used in common between the said co-partners,

so that either of them may have free access thereto, without any interruption from or on the part of the other.

7. The said co-partners once in ——— months, or oftener if either party shall require, upon the reasonable request of one of them, shall make, yield and render, each to the other, or to the personal representatives of each other, a true, just and perfect account of all profits and increase, by them or either of them made, and of all losses by them or either of them sustained, and also of all payments, receipts, disbursements, and all other things whatsoever by them or either of them made, received, disbursed, acted, done or suffered, in and about the said co-partnership and joint business as aforesaid; and the same account so made, shall and will clear, adjust, pay and deliver each to the other, at the time of making such account, their equal shares of the profits so made as aforesaid.

8. And at the end of the said term of ——— years, or other sooner determination of the co-partnership aforesaid, by the death of one of the co-partners or otherwise, the said co-partners, each to the other, or in case of the death of either of them, the surviving party to the personal representatives of the party deceased, shall and will make and render a true, just, perfect, and final account of all things as aforesaid, touching the said joint business and co-partnership, and divide the profits as aforesaid, and in all things well and truly adjust the same and the transactions thereof; and that upon the making and rendering of such final account, all and every the stock and stocks, as well as the gains and increase thereof, which shall appear to be remaining, whether consisting of money, wares, debits, &c., shall be equally parted and divided between the said co-partners, and their personal representatives, share and share alike; and,

9. It is agreed specially between the said co-partners, that no contract, guaranty, or transaction shall be entered into in the name or on behalf of the co-partnership, and the co-partnership name shall not be affixed or placed to or on any writing whatsoever, unless such contract, guaranty, transaction, or writing shall directly concern and relate to the business and affairs of the said co-partnership.

Witness the hands and seals of the parties, the day and year first above written.

C. C. [SEAL.]

D. D. [SEAL.]

### 32. *Articles of Special or Limited Partnership.*

(1 Insts. Com. & Stat. Law, 506; Grayd. Forms, 61.)

This is to certify to whom it may concern, that we, C. C., of ———, D. D., of ———, E. E., of ———, and F. F., of ———, have entered into a limited partnership, under and in pursuance of the statutes in that case made and provided, upon the terms, conditions, and liabilities hereinafter set forth, and those in the said statutes prescribed. That is to say:

1. The said partnership is to be conducted under the name or firm of C. C. & Company, of which C. C., residing in the ——— of ———, and D. D., residing in the ——— of ———, are general partners, and E. E., residing in the ——— of ———, and F. F., residing in the ——— of ———, are special partners.

2. The general nature of the business intended to be transacted by the said firm or partnership is the mining, smelting, and manufacturing of iron ore, and transporting the same in its crude and manufactured state from, &c. [*Describe as definitely as may be the projected business.*]

3. Each of the special partners has contributed to the common stock of the said firm the amount now herein set forth, to-wit: E. E. the sum of ——— dollars, and F. F. the sum of ——— dollars.

4. The places of business of the said partnership are to be at ——— and ——— ; the partnership is to commence from the date hereof, and is to terminate on the ——— day of ———, in the year of our Lord, 18—.

Witness the hands of the said parties, this ——— day of ———, in the year of our Lord, 18—.

C. C.  
D. D.  
E. E.  
F. F.

### *Oath of General Partners.*

Virginia :

County [or "corporation,"] of ———, to-wit :

This day C. C., whose name is mentioned as a general partner in a certain limited partnership, the articles whereof are hereinto annexed, appeared before me, a justice of the peace, [or "notary public," &c.] in and for the county [or "corporation,"] and State aforesaid, and made oath that E. E. and F. F., the special partners named in the said articles of limited partnership, have contributed to the common stock thereof, and have actually paid in cash, the above-named E. E. the sum of ——— dollars, and the above-named F. F. the sum of ——— dollars. Given under my hand this ——— day of ———, 18—.

W. R., J. P.

### *Certificate of Acknowledgment for Registry.*

Virginia :

County [or "corporation,"] of ———, to-wit :

I, ———, a justice of the peace [or "notary public," &c.] in and for the county [or "corporation,"] and State aforesaid, do hereby certify that C. C., D. D., E. E., and F. F., whose names are signed to the writing above, [or "hereunto annexed,"] bearing date on the ——— day of ———, in the year 18—, have acknowledged the same before me, in my county [or "corporation,"] aforesaid. Given under my hand this ——— day of ———, 18—.

W. R., J. P.

### 33. *Certificate of Special Partnership,—“Limited.”*

(Acts 1874-'5, c. 140, p. 118 & seq.)

This is to certify to whom it may concern, that we, C. C., D. D., E. E., F. F., and G. G. have formed a special partnership-association, "limited," under and in pursuance of the Act of Assembly, approved March 2, 1875, upon the terms, conditions, and liabilities hereinafter set forth, and those in the said Act of Assembly prescribed. That is to say :

1. The names of the persons composing the said partnership-association are C. C., D. D., E. E., F. F., and G. G.

2. The amount of capital of said partnership is ——— thousand dollars, divided into shares of ——— dollars each, of which C. C. has subscribed for ——— shares, D. D. for ——— shares, E. E. for ——— shares, F. F. for ——— shares, and G. G. for ——— shares.

3. The shares are to be paid for as follows, namely : ——— dollars upon each share, within ——— days from the date of this certificate, and the residue in equal monthly instalments, on the first day of every month thereafter.

4. The name of the association is "The ——— Tanning Company Limited ;" and its contemplated duration is ——— years, from the date of this certificate.

5. The officers of the association for the year ending on the ——— day of

—, 18 —, are C. C. president, D. D. treasurer, and E. E. secretary, which three persons are also the managers of the said association during the said year, and until their successors are installed.

6. The business of the said association shall be the buying and tanning of hides and skins, and the manufacturing and selling of leather, with all that pertains to the said business. [*Describe the business as definitely as may be.*]

7. The principal office or place of business is to be established and maintained at — in the State of Virginia.

8. There shall be at least one meeting of the members of the association in each year, to be held at the principal office of the association, on the — day of — annually, unless the managers for the time being shall in writing appoint a different time or place within the county of —, and give each member a week's notice thereof.

9. The managers may at any time call a meeting of the members of the association, at any place within the county of —, giving each member one week's notice thereof in writing.

10. There shall be chosen yearly, at the annual meeting of the members of the association, three members to be managers for the ensuing year, and until their successors are installed, of whom one, to be designated by themselves, shall be president, one treasurer, and one secretary.

11. The managers shall make by-laws for their government and the government of the business of the association, so that they shall not be repugnant to these articles, nor to the law of the land; shall take from the treasurer a suitable bond, with good security, to be renewed as often as occasion shall require; shall appoint the respective officers and servants of the company their respective duties; shall direct and superintend the business and operations of the association; shall direct what dividends, if any, are to be declared; and shall make a full report to the annual meeting of the members.

12. Each partner in the said association hereby agrees to waive the benefit of the homestead exemption as to any debt which he may at any time owe said association.

Witness the hands of the said parties, this — day of —, in the year of our Lord, 18—.

C. C.  
D. D.  
E. E.  
F. F.  
G. G.

Admitted to record upon a certificate of acknowledgment like that appended to Form 32.

### 34. *Indentures of Apprenticeship by Parent or Guardian.*

(1 Inst. Com. & Stat. Law, 180 & seq; Mayo's Guide, 46.)

This indenture, made this — day of —, in the year of our Lord, 18—, between F. F., the father of C. C., a minor, fourteen years old and upwards, of the — of —, of the first part; M. M., of the — of —, of the second part; and the said C. C. of the third part, witnesseth: That the said F. F., by and with the consent of the said C. C., attested by his being a party to these presents, doth put and place the said C. C., aged — years, apprentice to the said M. M., with him to dwell and serve from the date of these presents until the said apprentice shall accomplish his full age of twenty-one years, [or if a female, "eighteen years."] And the said F. F., for himself and his heirs, doth covenant and agree



with the said M. M. and his assigns, that the said C. C. shall and will faithfully serve the said M. M., his master, in all lawful business, according to his power, wit, and ability, and honestly, orderly, and obediently in all things demean and behave himself towards his said master, and his master's family, during the said term of apprenticeship. And the said M. M. doth, for himself and his heirs, covenant and agree with the said F. F., that he, the said M. M., shall and will well and truly instruct the said C. C. in the art, trade, or mystery of a ———, which the said M. M. now followeth, and will use all due diligence to make the said C. C. as perfect as possible in the said art, trade, or mystery. And that the said M. M. will find, provide, and allow to the said C. C. during the said term, good and sufficient meat, drink, apparel, washing, lodging, and all other things necessary and suitable for an apprentice; and will cause the said C. C. during the said term to be taught reading, writing, and common arithmetic, including the rule of three; and will moreover pay to the said C. C., at the expiration of the term aforesaid, ——— dollars, and furnish him with a complete suit of good and suitable clothing.

Witness the hands and seals of the parties, the day and year first above written.

F. F. [SEAL.]

M. M. [SEAL.]

C. C. [SEAL.]

### 35. *Indentures of Apprenticeship with Assent of Court.*

(1 Inst. Com. & Stat. Law, 181; Mayo's Guide, 45.)

This indenture, made this — day of —, in the year of our Lord, 18—, between F. F., of the — of —, the father of C. C., an infant, under the age of fourteen years, of the one part, and M. M., of the — of —, of the other part, witnesseth: That the said F. F., by and with the allowance and consent of the county [or "corporation"] court of the county [or "corporation"] of —, by an order of the said court, made on the — day of —, 18—, in pursuance of the statute in that case made and provided, doth by these presents put and place the said C. C., aged — years, apprentice to the said M. M., &c. [Follow Form 34 to the end.]

### 36. *A General Letter of Attorney to Receive Debts.*

(Ante, p. 29; Grayd. Forms, 342.)

Know all men by these presents, that I, C. O., of —, do hereby make, constitute, and appoint D. D. my true and lawful attorney in fact, for me and in my name, and to my use, to demand, sue for, recover and receive of E. E., &c., all and every such sum or sums of money, debts, or demands whatsoever, as now are [or during the continuance of this power shall become] due and owing unto me by the said E. E., and in default of payment thereof to have, use, and take all lawful ways and means, in my name or otherwise, for the recovery thereof, by action, suit, or any manner of legal process, or otherwise, and to compound and agree for the same. And on receipt thereof to make and deliver for me, and in my name, acquittances or other sufficient discharges for the same; and to do all lawful acts and things whatsoever concerning the premises, as fully in every respect as I myself might or could do if I were personally present; and attorney or attorneys under him, for the purposes aforesaid, to make, and at his pleasure to revoke; hereby ratifying, allowing, and confirming all and whatsoever my said attorney shall, in my name, lawfully do, or cause to be done, in and about the premises, by virtue of these presents. Witness my hand and seal, this — day of —, in the year 18—.

C. O. [SEAL.]

NOTE.—If there are two attorneys, say “D. D., &c., and Z. Z., &c., jointly, and either of them severally, to be my true and lawful attorneys and attorney in fact, for me,” &c.

### 37. *Letter of Attorney to Sell Lands.*

(Tate's Forms, 90; Grayd. Forms, 339.)

Know all men by these presents, that I, C. C., of —, do hereby make, constitute and appoint D. D., of —, my true and lawful attorney in fact, for me and in my name to bargain, sell, grant, release, and convey to such person or persons, and for such sum or sums of money, or other consideration or considerations as my said attorney shall deem most for my advantage and profit, all that tract or parcel of land, situate and being in [*describe the property with convenient particularity*]; and upon such sale or sales convenient and proper deeds, with such covenant or covenants of warranty, general or special, as to my said attorney shall seem expedient, in due form of law, as my deed or deeds, to make, seal, deliver, and acknowledge for registry, and for me and in my name to accept and receive all and every the sum or sums of money, or other consideration or considerations whatsoever, which shall be coming to me on account of the said sale or sales, and upon the receipt thereof, suitable acquittance or acquittances, in my name and on my behalf, to make, seal and deliver. And I do empower my said attorney in fact to make an attorney or attorneys under him, for the purposes aforesaid, or any of them, and such attorney or attorneys at his pleasure to revoke; and generally to my said attorney I give full power and authority touching the premises, to do, execute, proceed with and finish in all things, in as ample a manner as I might do if personally present; hereby ratifying and confirming all lawful acts done by my said attorney by virtue hereof.

Witness my hand and seal, this — day of —, in the year of our Lord, 18—.

C. C. [SEAL.]

☞ In general, this power should be registered. See certificate, *post*, Form 41.

### 38 *Bill of Sale of Chattels.*—(*Ante*, p. 31; Grayd. Forms, 108.)

Know all men by these presents, that I, C. C., of —, in consideration of the sum of — dollars to me in hand paid by D. D., of —, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, do hereby bargain, sell, assign, and deliver unto the said D. D. the goods and chattels following, namely, [*describe the particulars of the goods sold*]. To have and to hold the said [goods] unto the said D. D. and his assigns for ever. And I, the said C. C., for myself and my heirs, do covenant with the said D. D., and his assigns, that the said [goods] are sound, and of good and merchantable quality, [*state the warranty of quality as it was made*]; and further, that I will warrant the title to the said [goods] to the said D. D., and his assigns, for ever, free from the claims of all persons whatsoever.

Witness my hand and seal, this — day of —, 18—.

C. C. [SEAL.]

### 39. *Conveyance of Lands by Feoffment.*

(2 *Insta. Com. & Stat. Law*, 670, 675; 2 *Bl. Com.* 441; *Ante*, p. 32 & seq. 43 & seq. 51.)

Know all men that I, William, son of William de Segenho, have given, granted, and by this my present deed have confirmed unto John, son of the late John de

Saleford, in consideration of a certain sum of money to me in hand paid beforehand, one acre of my arable land, lying in Saleford plain, adjacent to the land of the late Richard de la Mere, to HAVE and to HOLD the whole of the aforesaid acre of land, with all its appurtenances, unto the said John, and his heirs and assigns, of the chief lords of the fee; rendering and doing annually to the said chief lords therefor due and accustomed services. And I, the aforesaid William, and my heirs and assigns, the whole of the aforesaid acre of land, with all its appurtenances, to the aforesaid John de Saleford, and his heirs and assigns, against all persons will warrant forever. In testimony whereof, to this present deed, I have affixed my seal, in the presence of the following witnesses: Nigel de Saleford, John, the miller of the same town, and others. Dated at Saleford, on Friday next before the feast of Saint Mary the Virgin, in the sixth year of the reign of King EDWARD, son of King EDWARD.

L. S.

MEMORANDUM.—That on the day and year within written, full and quiet seisin of the within specified acre, with the appurtenances, was given and delivered by the within-named William de Segenho, to the within-named John de Saleford, in their proper persons, according to the tenor and effect of the within written deed, in the presence of Nigel de Saleford, John de Seybrooke, and others.

☞ Certificate of acknowledgment for registry as in Form 40, *post*.

#### 40. *Conveyance of Lands by Bargain and Sale.*

(*Ante*, p. 49; 2 Insts. Com. & Stat. Law, 730 & seq. 746; Tate's Forms, 146.)

This indenture, made this — day of —, in the year of our Lord, 18—, between C. O., of —, and E., his wife, of the one part, and D. D., of —, of the other part—WITNESSETH, that the said C. O. and E., his wife, for and in consideration of the sum of — dollars to them in hand paid, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell, release, and confirm to the said D. D., and his heirs and assigns for ever, all of that certain tract or parcel of land lying in —, and containing by estimation [*or by recent survey*,] — acres, be the same, however, ever so much more or less, and bounded as follows, to-wit, Beginning at [*describe the boundaries of the land*]. Together with all the appurtenances to the said land belonging, or in any wise appertaining. To have and to hold the said tract or parcel of land, with its appurtenances aforesaid, unto the said D. D., his heirs and assigns, for ever.

And the said C. O., for himself and his heirs, doth covenant and agree with the said D. D., his heirs and assigns, in manner and form following, to-wit:

That the said C. O. [or “the said C. O. and E., his said wife,”] is [or “are”] seised in fee-simple [or “seised in fee-simple in right of the said E.,” or “that the said E. is seised in fee-simple,”] of the said tract or parcel of land, with its appurtenances aforesaid.

That the said C. O., and E., his wife, have good right and lawful power to convey the said tract or parcel of land, with its said appurtenances, to the said D. D. in fee-simple.

That the said D. D., and his heirs and assigns, shall have quiet and peaceable possession of the said land, and its appurtenances aforesaid, for ever.

That the said tract or parcel of land, with its appurtenances aforesaid, is free from all incumbrances and charges whatsoever; and,

That the said C. O., and E., his wife, will execute such further assurances of an-

for the said land, and its appurtenances, as may be requisite to make the title thereto of the said D. D., his heirs and assigns, sure and complete for ever.

Witness the hands and seals of the parties, the day and year first above written.

C. C. [SEAL.]

E. C. [SEAL.]

D. D. [SEAL.]

NOTE 1.—When there are no stipulations on the part of the grantee, it is not usual for him to sign it, so that the conveyance is not then truly an indenture, and might better be in the form of a deed poll, thus :

Know all men that we, C. C., of —, and E., his wife, for and in consideration of — dollars to us in hand paid at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, do grant, bargain, sell, release, and confirm unto D. D., of —, his heirs and assigns for ever, all that tract or parcel of land, &c. [*as in the form above, and as no date is mentioned in the beginning, the conclusion would be :*]

Witness the hands and seals of the said C. C., and E., his wife, this — day of —, in the year of our Lord, 18—.

NOTE 2.—It is proper also to remark, that whilst the covenants of title in Form 40 are such as ought to be inserted in every conveyance where a covenant of title is of any consequence, yet it is most usual to employ instead a single covenant, much more vague and unsatisfactory, which is about equivalent, in import and effect, to the third in the series of covenants in No. 40, (the covenant for quiet enjoyment,) and in form stipulates that the grantor will for ever warrant and defend the title to the premises conveyed to the grantee, his heirs and assigns, against the claims of all persons whatsoever. (*Ante*, p. 42 ; 2 Insts. Com. & Stat. Law, 642.) The uncertainty of the precise effect of this covenant, and the certainty that it is, at best, no more than equivalent to a covenant of quiet enjoyment, would seem reasonably to exclude it from practical use ; but not only is it most usual, but the legislature has itself encouraged the continued employment of it, by providing that a covenant by the grantor "that he will warrant generally, (or specially, as the case may be,) the property" conveyed, shall have the same effect as the covenant set forth above, (V. C. 1873, c. 113, § 10, 11,) nay, further, that the words "with general warranty," or "with special warranty," in the granting part of a deed, shall be deemed to be a covenant that the grantor will warrant generally (or specially) the property conveyed. (V. C. 1873, c. 113, § 12 ; 2 Insts. Com. & Stat. Law, 643-4.)

*Acknowledgment and Privy Examination of Wife, and Acknowledgment of Husband, for Registry.*

(V. C. 1873, c. 117, § 4, 7 ; *Ante*, p. 50, 51 ; 2 Insts. Com. & Stat. Law, 839 & seq.)

State [or "Territory," or "District,"] of — :

County [or "corporation,"] of —, to-wit :

We, — and —, justices of the peace, [or "I, a notary public," or "I, a commissioner in chancery of the — court,"] in and for the county [or "corporation,"] of —, in the State [or "Territory," or "District,"] aforesaid, [or "I, a commissioner appointed by the Governor of the State of Virginia, for the said State, [or "Territory," or "District,"] of —, do certify that E. C., the wife of C. C., whose names are signed to the writing above, [or "hereto annexed,"] bearing date on the — day of —, in the year 18—, personally appeared before us [or "me,"] in the county, [or "corporation,"] and State [or "Territory," or

"District,"] aforesaid, and being examined by us [or "me"] privily and apart from her husband, and having the writing aforesaid fully explained to her, she, the said E. C., acknowledged the said writing to be her act, and declared that she had willingly executed the same, and wished not to retract it. And we [or "I,"] do also certify that at the same time and place, the said C. C. also in our [or "my"] presence acknowledged the said writing. Given under our hands [or "my hand"] this — day of —, in the year of our Lord, 18—.

E. E.

F. F.

#### 41. *Conveyance of Land by Covenant to Stand Seised.*

(*Ante*, p. 49; 2 *Insta. Com. & Stat. Law*, 732 & seq. 747 & seq.)

Know all men that I, C. C., of —, for and in consideration of the natural love and affection which I have for my brother D. C., and for the further consideration of one dollar to me by the said D. C. in hand paid at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, for myself and my heirs, do covenant and agree with the said D. C., his heirs and assigns, that I and my heirs shall and will stand seised to the use of the said D. C., his heirs and assigns for ever, of all that certain tract or parcel of land lying in —, and containing by estimation [*or by recent survey*,] — acres, be the same, however, ever so much more or less, and bounded as follows, to-wit: Beginning at [*describe the boundaries of the land*], together with all the appurtenances to the said land belonging, or in any wise appertaining. To have and to hold the said tract or parcel of land, with its appurtenances aforesaid, unto the said D. C., his heirs and assigns for ever.

And I, the said D. C., for myself and my heirs, do covenant and agree with the said D. C., his heirs and assigns, in manner and form following, to-wit:

That I, the said C. C., am seised in fee-simple of the said tract or parcel of land, with its appurtenances aforesaid;

That I have good right and lawful power to convey the said tract of land, with its said appurtenances, to the said D. C. in fee-simple;

That the said D. C., and his heirs and assigns, shall have quiet and peaceable possession of the said land, and its appurtenances, for ever;

That the said tract or parcel of land, with its appurtenances, is free from all incumbrances and charges whatsoever; and,

That I, the said C. C., will execute such other further assurances of and for the said land, and its appurtenances, as may be requisite to make the title thereto of the said D. C., his heirs and assigns, sure and complete for ever.

Witness my hand and seal, this — day of —, in the year of our Lord, 18—.

C. C. [SEAL.]

#### *Certificate of Acknowledgment for Registry.*

(*Ante*, p. 50, 51, 52; 2 *Insta. Com. & Stat. Law*, 861 & seq.; V. C. 1873, c. 117, § 2, 3.)

State [or "Territory," or "District,"] of —:

County [or "corporation"] of —, to-wit:

I, a justice of the peace, [or "a notary public," or "a commissioner in chancery of the — court,"] in and for the county [or "corporation,"] of —, in the State [or "Territory," or "District,"] aforesaid, [or "I, a commissioner appointed by the Governor of the State of Virginia, for the State [or "Territory," or "District,"] of —,"] do certify that C. C., whose name is signed to the writing above, [or "hereto annexed,"] bearing date on the — day of —, 18—, has ac-

knowledgeed the same before me in my county [or "corporation"] and State [or "Territory," or "District,"] aforesaid. Given under my hand, this — day of —, in the year of our Lord, 18—.

W. R., J. P.

#### 42. *Conveyance of Land by Grant.*


(*Ante*, p. 49, 50; 2 Insts. Com. & Stat. Law, 748-'9.)

Know all men that we, C. C., of —, and E., his wife, for and in consideration of — dollars, to us in hand paid at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, do grant, sell, aliene, release, and confirm unto D. D., of —, his heirs and assigns, forever, all that tract or parcel of land, &c. [*Substantially as in Form 40, except that, as no date is in this Form mentioned in the beginning, the conclusion would be:*]

Witness the hands and seals of the said C. C., and E., his wife, this — day of —, in the year of our Lord, 18—.

C. C. [SEAL.]

E. C. [SEAL.]

 The certificate of Privy Examination of Wife, and of Acknowledgment of Husband, for registry, to be as in Form 40.

#### 43. *Conveyance of Land as Prescribed by Statute.*

(V. C. 1873, c. 113, § 1; 2 Insts. Com. & Stat. Law, 824-'5.)

This deed, made the — day of —, in the year —, between [*here insert names of parties*], witnesseth: That in consideration of [*here state the consideration*], the said — doth [or do] grant unto the said — all, &c. [*Here describe the property, and insert covenants, or any other provisions.*] Witness the following signature and seal [or signatures and seals.]

 The certificate of acknowledgment, &c., for registry, to be as in Form 40 or 41.

#### 44. *Conveyance of Land by Executrix.*

(Tate's Forms, 141.)

Whereas, C. C., late of —, now deceased, was in his life-time lawfully seised in fee-simple of a certain tract or parcel of land lying in —, and containing, by recent survey, — acres, and bounded as follows: Beginning at, etc., [*describe the land*], which said land was conveyed to the said C. C. in his life-time by R. S., of —, by deed bearing date the — day of —, in the year —, as by the said deed, of record in the — court of — county, [or "corporation"] of —, will more fully appear. And whereas the said C. C., by his last will and testament in writing, bearing date on the — day of —, in the year —, and duly proved and recorded in the — court of the — of —, did will, devise and direct that all his just debts should be paid, and then that the remainder of his estate, both real and personal, should be and pass in fee, and in absolute property, to P. C., then the wife, and now the widow of the said C. C.; and did, by the said will, constitute and appoint the said P. C. the sole executrix thereof, as by the said will, reference being thereto had, will more fully appear. And whereas the said P. C. has found it necessary, in order to pay off and discharge the debts and demands against the estate of her said decedent, to sell the said lands,—NOW THIS DEED WITNESSETH, that the said P. C., as executrix, widow and residuary legatee of the said C. C., deceased, for and in consideration of

the premises, and for the further consideration of — dollars, to her in hand paid by D. D., at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, doth by these presents, grant, bargain, sell, release, assign and confirm, by virtue of the power and authority on her conferred by virtue of the said will of the said C. C., unto the said D. D. and his heirs and assigns forever, all of the above described tract or parcel of land, together with the privileges and appurtenances thereunto belonging; and doth remise, release, and forever quit claim and grant unto the said D. D., and his heirs and assigns, all the right which the said P. C. hath to dower in the aforesaid conveyed premises, whereof her husband, the said C. C., died seised, and also all her estate and interest therein, as the residuary devisee thereof, under the will of the said C. C., to have and hold the said tract or parcel of land, with its appurtenances aforesaid, unto the said D. D. and his heirs and assigns forever.

And the said P. C. doth, for herself and her heirs, covenant and agree with the said D. D. and his heirs and assigns, that she hath not done, nor suffered to be done, any act, matter or thing, to incumber or in any wise charge the said tract or parcel of land, and that the said D. D. and his heirs and assigns shall henceforth have and quietly enjoy the said tract or parcel of land and its appurtenances, free from all claims and demands made or set up thereto by the said P. C., or any person or persons claiming by, through, or under her.

Witness the hand and seal of the said P. C., this — day of —, in the year of our Lord —.

P. C. [SEAL.]

☞ The certificate of acknowledgment for registry is the same as in Form 41.

#### 45. *Conveyance of Land by Lease, as Prescribed by Statute in Virginia.*

(*Ante*, p. 44; V. C. 1873, p. 113, § 4; 2 Inst. Com. & Stat. Law, 676 & seq. 826.)

This deed, made the — day of —, in the year —, between [*here insert the names of the parties*], witnesseth that the said — doth [or "do"] demise unto the said —, his personal representatives and assigns, all, etc., [*here describe the property*], from the — day of —, for the term of — thence ensuing, yielding therefor, during the said term, the rent of [*here state the rent and mode of payment*]. Witness the following signature and seal [or "signatures and seals"]. ☞

☞ The certificate of acknowledgment for registry [*supposing the term to exceed five years*] is the same as in Form 41.

#### 46. *Lease of Messuage, with Covenants.*

(V. C. 1873, c. 117, § 17 & seq.; 2 Inst. Com. & Stat. Law, 835-'6; Tate's Forms, 155.)

This indenture, made this — day of —, in the year of our Lord, 18—, between C. C., of —, of the one part, and D. D., of —, of the other part, witnesseth, that in consideration of the rents, provisos and agreements hereinafter contained, and which, on the part of the said D. D. and his assigns are to be paid, done and performed, the said C. C. doth grant, bargain, sell, lease, demise, and to farm let unto the said D. D. and his assigns, all that lot, messuage and tenement situate and being in the [*describe the property particularly*], together with all houses and buildings, easements, alleys, ways, profits and appurtenances whatsoever, to the said lot, messuage, and tenement be-

longing, or in any wise appertaining. To have and to hold the said lot, messuage, and all and singular the premises hereby demised, with the appurtenances aforesaid thereto belonging, unto the said D. D. and his assigns, from the day of the date hereof, for and during the term of — years next ensuing, and fully to be complete and ended, yielding and paying therefor, to the said C. C., and his assigns, during the said term, a rent of — dollars yearly, in gold, in equal quarterly payments, on the — day of —, —, —, and —, respectively, in each year. And the said C. C., for himself and his heirs, doth covenant and agree with the said D. D., and his assigns, that he paying the rent herein-before reserved, and otherwise keeping and performing all and singular the covenants and agreements herein contained, on his or their part, to be observed, kept, and performed, shall peaceably and quietly, during the said term of — years, possess and enjoy the said lot, messuage, and tenement, with the appurtenances aforesaid, without let, hindrance, molestation, or disturbance from any one whatsoever. And it is agreed by and between the said parties, that if at the expiration of the said term of — years, the said D. D. shall desire to retain the said lot, messuage, and tenement, with the appurtenances aforesaid, for — years, next after the expiration of the said term of — years, the said D. D. shall have the power and right so to retain the same on the terms, stipulations, and covenants herein expressed, touching the term of — years next ensuing the date thereof.

And the said D. D., for himself and his heirs and assigns, doth covenant and agree with the said C. C., and his heirs and assigns, in manner following, that is to say :

That the said D. D., his heirs and assigns, will, during the said term, well and truly pay, in gold, to the said C. C., and his assigns, the said yearly rent of — dollars in the manner hereinbefore limited and appointed, according to the reservation thereof, except the said messuage, tenement, and premises, or some part thereof, shall happen to be burnt down, or damaged by fire, tempest, or other casualty not occasioned by the default of the said D. D., or of his assigns ; in either of which cases the said rent is either to cease or to be fairly apportioned, according as the said destruction of the said messuage, tenement and premises is entire or partial.

That the said D. D., his heirs or assigns, shall and will, during the said term, pay all taxes, levies, and assessments upon the said demised premises, or upon the said C. C., on account thereof.

That the said D. D., or his assigns, will not, during the term aforesaid, assign or under-let the said demised premises, or any part thereof, to any person whatsoever, without the consent in writing of the said C. C., his heirs or assigns.

That the said D. D., or his assigns, at the expiration or other sooner determination of the said term of — years, will peaceably surrender and yield up unto the said C. C., his heirs or assigns, the premises demised, with the appurtenances aforesaid.

That the said D. D., his heirs or assigns, shall and will, at his or their proper costs and charges, from time to time, and at all times hereafter, during the said term, well and sufficiently repair and cleanse the said messuage and tenement, and all and singular other the premises hereby demised, and every part and parcel thereof, by and with all, and all manner of needful and proper reparation, so as to preserve the same from decay and deterioration, excepting any casualty by fire or other occurrence which may consume or destroy the said messuage, tenement, and premises, or any part thereof, without default on the part of the said D. D., or his assigns ; it being understood and agreed by and between the parties hereto, that such loss or injury happening to the said messuage, tenement, and premises with-



out any default on the part of the said D. D., or his assigns, is to be sustained by the said C. C., his heirs or assigns, and that on the happening of such injury or destruction as aforesaid, the said D. D. is to be entirely discharged from the obligations of this indenture, unless the said C. C. shall, within a reasonable time after notice to him in writing of such complete or partial destruction, rebuild or repair the said messuage, tenement, and premises, so that the same shall be in as good a condition as before such casualty occurred, and until such re-building or repairs shall be completed, the said rent is to be suspended or duly apportioned.

That the said D. D., and his assigns, shall not use nor employ the said messuage, tenement or premises, or any part thereof, in any other way or manner than as the same have been customarily used by previous occupants thereof, within ten years last past; and,

That in the event of a default of ——— days in the payment of any of the instalments of the rent hereinbefore stipulated for, or of the breach of any of the covenants and agreements herein contained, on the part of the said D. D., his heirs or assigns, to be observed, kept, or performed, the said C. C., his heirs or assigns, at any time afterwards, into and upon the demised premises, or any part thereof, in the name of the whole, shall and may re-enter, and the same again have, re-possess, and enjoy, as of his or their former estate.

Witness the hands and seals of the parties, the day and year first above written.

C. C. [SEAL.]

D. D. [SEAL.]

☞ The certificate of acknowledgment for registry (supposing the lease to exceed five years) is the same as in Form 41.

#### 47. *Lease of Water Power.*—(*Tate's Forms*, 161.)

This indenture made this — day of — in the year of our Lord 18—, between C. C. of —, of the one part, and D. D. of —, of the other part; Witnesseth that the said C. C., in consideration of the rents and covenants hereinafter reserved and stipulated on the part of the said D. D. to be paid and performed, doth grant, demise and lease, unto the said D. D. and his assigns, the right and privilege of using the water passing from the mill of the said C. C., situate on the —, after it has worked the said mill, in the construction or propelling of any kind of machinery at the factory of the said D. D., or for any other purpose to which the said D. D. or his assigns may think fit to apply the same, except for that of working a mill to grind grain, and with this reservation and restriction, as fully and amply, to all intents and purposes, as the same may now be applied and used by the said C. C., to have and to hold the said right and privilege of the water aforesaid, and to use and enjoy the same, subject to the exception and restriction aforesaid, unto the said D. D. and his assigns, for and during, and until the full end and term of — years, from the — day of — in the year —. Yielding and paying therefor, unto the said C. C. and his assigns, during every of the said years, in gold, the annual sum of — dollars, by quarterly payments of — dollars each, the first whereof is to be paid on the — day of — in the year 18—. And the said C. C. for himself, his heirs and assigns, doth covenant and agree with the said D. D. and his assigns, that the said D. D. and his assigns shall have and enjoy the water as aforesaid, except such casual hindrance and interruption as may be caused by the needful repairs in and about the said mill of the said C. C., or any of the appurtenances thereto belonging, which shall be made with as little delay as possible, after reasonable notice given to the said D. D. and his assigns, of the intended interruptions of the regular flow of the water.

And the said D. D., for himself, his heirs and assigns, doth covenant and agree with the said C. C. and his assigns, that the said D. D., his heirs and assigns, will well and truly pay to the said C. C. and his assigns, the said rent in gold, during the said term, at the periods aforesaid; and also, that the said D. D. and his assigns, will not use nor employ the water aforesaid for the working of any mill for the grinding of grain; and it is by these presents agreed and provided that the right and privilege on the part of the said D. D. and his assigns, of using the said water for any purpose whatsoever, shall *ipso facto* immediately cease if the said D. D. or his assigns shall, in violation of the provisions in this indenture contained, proceed to apply the same to the working of a mill or other machine for the grinding of grain.

Witness the hands and seals of the said parties, the day and year first above written.

C. C. [SEAL.]

D. D. [SEAL.]

☞ Certificate of acknowledgment for registry as in Form 41.

#### 48. *Conveyance of Land Sold under Decree of Court.*

(Tate's Forms, 162.)

This indenture, made this — day of —, in the year of our Lord —, between C. C., of —, of the first part, and D. D., of —, of the second part: Whereas, on the — day of —, in the year 18—, it was decreed and ordered by the — court of the — of —, in a certain cause then depending on the chancery side of the said court, between A. L. and C. L., complainants, and G. S. and L. S., defendants, that the said C. C., who was thereby appointed commissioner for the purpose, should at public auction, upon the following terms, to-wit: One-half of the purchase-money to be paid in cash, the remainder to be paid in twelve months, the payment thereof to be secured by bond or bonds, with good personal security, besides reserving the title until payment; make sale of a certain tract or parcel of land, lying and being in [*describe the land by its locality*], having first advertised the time, terms, and place of sale for the period of —, in some newspaper published in —, and on receiving the whole of the purchase-money, that the said C. C., commissioner as aforesaid, should convey the said tract or parcel of land to the purchaser or purchasers thereof in fee-simple. And whereas the said C. C., commissioner as aforesaid, in pursuance of the said decretal order, did, on the — day of —, in the year —, on the premises, offer for sale, at public auction, the tract or parcel of land aforesaid, mentioned and described in the complainant's bill in the said cause; having, in pursuance of the said decretal order, advertised the time, terms, and place of sale, in the —, a newspaper published in —, for the period of —, as will appear by a certificate of R. E., the editor of the said paper, filed with a report made to the said court of the proceedings of the said commissioner, at which sale the said tract or parcel of land was struck off to the said D. D. for the sum of — dollars, that being the highest bid for the same. And whereas the whole of the purchase-money has been paid, according to the said decretal order: Now this indenture witnesseth that the said C. C., commissioner as aforesaid, in order to carry into effect the said sale, made as aforesaid, in pursuance of the said decretal order, in consideration of the premises, and of the said sum of — dollars, to him in hand paid by the said D. D., agreeably to the terms of said decretal order, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, doth give, grant, bargain, sell, and convey unto the said D. D., his heirs and assigns, for ever, the said tract or parcel of land, with its appurtenances, situated and lying in —, it being the same land that was conveyed to — by —, by deed bearing date the — day of —, in

the year —, and of record in the clerk's office of the — court of the — of —, to which deed reference is hereby made for a more particular description of the premises. And the said C. C., commissioner as aforesaid, the title to the said tract or parcel of land, against himself and his heirs, and all persons claiming by, through, or under him, will for ever warrant and defend.

Witness the hands and seals of the parties, the day and year first above written.

C. C. [SEAL.]  
D. D. [SEAL.]

☞ Certificate of acknowledgment for registry as in Form 41.

#### 49. *Mortgage of Lands to Secure Debts.*

(Tate's Forms, 165; Grayd. Forms, 370.)

This indenture, made this — day of —, in the year of our Lord, 18—, between D. D., of —, of the one part, and C. C., of —, of the other part. Whereas, the said D. D. stands indebted unto the said C. C., in and by a certain writing obligatory, under his hand and seal, bearing even date herewith, in the sum of — dollars in gold, with interest thereon, after the rate of —, per centum per annum, from the — day of —, in the year 18—, until paid, to be paid to the said C. C., on the — day of —, in the year 18—, as by the said writing obligatory, reference being thereunto had, will more fully and at large appear, which said sum of — dollars in gold, with the interest thereon, as aforesaid, the said D. D. binds himself and his heirs, to pay, when the same is due, to the said C. C., or his assigns. Now, this indenture witnesseth that the said D. D., as well for and in consideration of the aforesaid debt of — dollars, and for the better securing the payment thereof, with its interest, unto the said C. C. and his assigns, as of the further sum of one dollar to him in hand paid by the said C. C., at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, doth grant, bargain, sell, release, and confirm unto the said C. C., his heirs and assigns for ever, all that tract or parcel of land situate and lying in —, known by the name of —, containing by estimation — acres, be the same, however, ever so much more or less, and bounded as follows, to-wit: Beginning at [*describe the boundaries*]; together with all the appurtenances to the said tract or parcel of land belonging, or in any wise appertaining; to have and to hold the said parcel or tract of land, with its appurtenances as aforesaid, unto the said C. C., his heirs and assigns for ever. And the said D. D., for himself and his heirs, doth covenant and agree with the said C. C., his heirs and assigns, that the said D. D. and his heirs will for ever warrant and defend the title to the said tract or parcel of land, with its appurtenances, unto the said C. C., and his heirs and assigns, free from the claims of all persons whatsoever, PROVIDED ALWAYS nevertheless, and UPON CONDITION, that if the said D. D., his heirs or assigns, shall well and truly pay unto the said C. C., or his assigns, the aforesaid debt of — dollars in gold, on the day hereinbefore mentioned, and appointed for the payment thereof, with interest for the same as aforesaid, without fraud, defalcation or deduction, then and from thenceforth, as well this present indenture, and the estate hereby granted, as the said recited writing obligatory, shall cease, determine, and become absolutely null and void to all intents and purposes, anything hereinbefore contained to the contrary, in any wise, notwithstanding.

Witness the hands and seals of the parties, the day and year first above written.

D. D. [SEAL.]  
C. C. [SEAL.]

☞ Certificate of acknowledgment for registry, as in Form, 41.

50. *Deed of Trust to secure Debts, as Prescribed by Statute.*

(V. C. 1873, c. 113, § 5.)

This deed, made the — day of —, in the year —, between — [the grantor], of the one part, and — [the trustee], of the other part, witnesseth: that the said — [the grantor], doth [or "do"] grant unto the said — [the trustee], the following property: [here describe it.] In trust to secure [here describe the debts to be secured, or the sureties to be indemnified, and insert covenants or any other provisions the parties may agree upon.] Witness the following signatures and seals, (or signature and seal.)

☞ Certificate of acknowledgment for registry, as in Form, 41.

51. *Deed of Trust to Secure the Payment of Money.*

(Tate's Forms, 177.)

This indenture, made this — day of —, in the year of our Lord, —, between D. D., of —, of the one part, T. T., of —, of the second part, and C. C., of —, of the third part: Whereas the said D. D. is justly indebted to the said C. C. in the sum of — dollars in gold, with interest thereon after the rate of — per centum per annum, from the — day of —, in the year —, until paid, as appears by the bond of the said D. D., bearing date the — day of —, in the year 18—, and payable on the — day of —, in the year 18—, which said debt, with interest as aforesaid, the said D. D. binds himself and his heirs to pay when due, and is now desirous more effectually to secure: Now, therefore, this indenture witnesseth, that the said D. D., for and in consideration of the premises, and of one dollar to him in hand paid by the said T. T., at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, doth grant, bargain, sell, aliene, release, and confirm unto the said T. T., his heirs and assigns, for ever, all that certain tract or parcel of land situated and lying in —, it being the same tract which was conveyed to the said D. D. by W. J., by deed bearing date on the — day of —, in the year —, and of record in the clerk's office of the — court of the — of —, as reference thereto being had, will more fully and at large appear, which said tract or parcel of land is bounded as follows, to-wit: Beginning at [describe the boundaries]; together with all the appurtenances to the said land belonging, or in any wise pertaining. To have and to hold the said tract or parcel of land, with its appurtenances, unto the said T. T., and his heirs and assigns, for ever. And the said D. D., for himself and his heirs, doth covenant and agree with the said T. T., his heirs and assigns, in manner and form following, to-wit: That the said D. D., and his heirs and assigns, the title to said tract or parcel of land, with all its appurtenances aforesaid, unto the said T. T., his heirs or assigns, against the claims of all persons whatsoever, will warrant and defend for ever. In trust, nevertheless, and for the use, interest, and purposes following, and none other, namely: that the said D. D. shall be suffered to remain in quiet and peaceable possession and enjoyment of the said premises, and their appurtenances aforesaid, until default be made in the payment of the debt aforesaid, with its interest aforesaid, or of some part thereof; and when the said D. D., his heirs or assigns, shall make default in the payment of the said debt, with interest as aforesaid, or of any part thereof, then upon this further trust, that as soon after such default as the said C. C., or his assigns, shall request, or the said T. T., or his heirs or assigns, shall think fit, the said T. T., or his heirs or assigns, shall proceed, at such time and place as he or they shall think best, to sell the said tract or parcel of land, with its appurtenances, or so much thereof as it may be necessary to sell, at public auction, to the highest bidder, for cash, having first

given — days' notice of the time and place of sale in one or more of the newspapers printed in — ; and out of the proceeds of such sale shall pay, first, all costs and charges attending the execution of this trust; secondly, shall pay to the said C. C., or his assigns, the said sum of — dollars in gold, with all the interest that shall have accrued thereon as aforesaid, or so much of said debt and interest as shall then remain unpaid; and the balance, if any, shall pay to the said D. D., his heirs and assigns. And if the said D. D., or his assigns, shall well and truly pay in gold the said debt, with interest thereon as aforesaid, and make no default therein, then this deed shall be void, or else shall remain in full force and virtue.

Witness the hands and seals of the parties, the day and year first above written.

D. D. [SEAL.]

T. T. [SEAL.]

C. C. [SEAL.]

☞ The certificate of acknowledgment for registry is as in Form 41.

## 52. Deed of Trust to Secure Endorsers in Bank.

(Grayd. Forms, 371; Tate's Forms, 181.)

This indenture, made this — day of —, in the year of our Lord, 18—, between D. D., of —, of the first part, T. T., of —, of the second part, and C. C., of —, of the third part. Whereas the said C. C. has endorsed for the accommodation of the said D. D., a certain note negotiable for the sum of — dollars, dated the — day of —, 18—, and payable — months after date, at the — Bank at —, and now discounted at the said Bank, and which said note it is contemplated to renew from time to time; and whereas the said D. D. is desirous to indemnify and secure the said C. C., against all loss by reason of his endorsement aforesaid. Now, this indenture witnesseth, that in consideration of the premises, and for the further consideration of one dollar by the said T. T. to the said D. D., in hand paid at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, the said D. D., doth grant, bargain, sell, and convey, release and confirm unto the said T. T. and his heirs, all that certain messuage and tenement, [*Describe the premises, and state whence the title was derived by D. D.*]; together with all the appurtenances and privileges to the said messuage and tenement belonging, or in any wise appertaining. To have and to hold the said messuage and tenement, with the appurtenances and privileges aforesaid, unto the said T. T. and his heirs for ever. And the said D. D., for himself and his heirs, doth covenant and agree with the said T. T. and his heirs and assigns, that the said D. D. and his heirs, the title to the said messuage and tenement, with all the appurtenances and privileges thereunto belonging, as aforesaid, unto the said T. T. and his heirs and assigns, against the claims of all persons whatsoever, will for ever warrant and defend. In Trust, nevertheless, and for the use, intent and purposes following, and none other, namely: that the said D. D. shall be suffered to remain in the quiet and peaceable possession and enjoyment of the said premises, and their privileges and appurtenances aforesaid, until default be made by the said D. D., in the payment of the negotiable note aforesaid, or any of the renewals or continuations of the same, which may be substituted therefor, or for any part thereof; and then upon this further trust,—that if the said C. C. or his assigns shall be compelled to pay, or shall pay at or after maturity, the said negotiable note, or any part thereof, or any note or notes given in renewal or continuation of the said note, in whole or in part, then and in either event, the said C. C. or his assigns may require the said T. T. to sell the said property in pursuance of the

terms of this deed. If a sale be required by the said C. C. or his assigns, the said T. T. shall, after fixing the time and place of sale, at his discretion, and advertising the same for — days in some newspaper printed in —, sell the said message and tenement, and the appurtenances and privileges aforesaid belonging thereto, or such part thereof as may be necessary for the purpose, at public auction, to the highest bidder for cash; and out of the proceeds of such sale, shall pay first all costs and charges attending the execution of this trust; secondly, shall pay to the said C. C. or his assigns, the amount of money which the said C. C. or his assigns shall then have paid on account or by reason of his endorsement aforesaid of such note or notes, together with lawful interest thereon from the time of such payment, and the balance, if any, shall pay to the said D. D. or his assigns. And if the said D. D. or his assigns, shall fully indemnify and save harmless the said C. C. and his assigns, against all loss and damage on account and by reason of the endorsements aforesaid, whether already made, or which may be hereafter made on other note or notes given in renewal or continuation of the said note first above mentioned, then this deed shall be void, or else shall remain in full force and virtue.

Witness the hands and seals of the parties, the day and year first above written.

D. D. [SEAL.]

T. T. [SEAL.]

C. C. [SEAL.]

43 The certificate of acknowledgment for registry is as in Form, 41.

### 53. *Conveyance of Land Sold under a Deed of Trust.*

(Sand's Forms, 109.)

This indenture, made this — day of —, in the year of our Lord, 18—, between T. T., of —, of the one part, and P. P., of —, of the other part: Whereas a certain D. D., of —, by a certain deed bearing date the — day of —, in the year 18—, and recorded in the clerk's office of the — court of the — of —, did grant and convey unto the said T. T., his heirs and assigns, all of a certain tract or parcel of land situate and lying in —, together with the appurtenances and privileges thereto belonging, or in anywise appertaining, in trust to secure a certain debt, to be paid by the said D. D. to one C. C.; and whereas by the said deed T. T., his heirs and assigns were empowered, on failure of the said D. D. or his assigns, to pay the said debt to the said C. C. or his assigns, to sell the said tract or parcel of land, with its appurtenances, or as much thereof as should be found necessary to accomplish the purposes of the said trusts therein contained; and whereas the said D. D. having failed to perform the requirements contained in the said deed, the said T. T., in execution of the said trusts therein declared, did on the — day of —, in the year 18—, after giving — days' notice of the time and place of sale by advertisement in the newspaper called —, printed in —, exposed to sale the tract or parcel of land aforesaid, with its appurtenances aforesaid, at public auction, to the highest bidder for cash; at which sale the said P. P. became the purchaser thereof, being the highest bidder. Now this indenture witnesseth, that the said T. T., trustee as aforesaid in the said deed of trust, for and in consideration of the premises, and for the further consideration of — dollars to him in hand paid by the said P. P. at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, which said sum is to be appropriated and applied as by the said deed of trust is directed, doth grant, bargain, sell and convey, release and confirm, unto the said P.

P., his heirs and assigns forever, all the tract or parcel of land aforesaid, with the privileges and appurtenances thereto belonging, or in any wise appertaining, situate and lying in ———, containing by estimation, [or *by survey*,] ——— acres, be the same, however, ever so much more or less, and bounded as follows: Beginning at [*describe the boundaries*]; it being the same tract or parcel of land conveyed by the deed first above mentioned to the said T. T. by the said D. D., in trust as aforesaid; to have and to hold the said tract or parcel of land, with its appurtenances aforesaid, to the said P. P., and his heirs and assigns forever. And the said T. T., for himself and his heirs, doth covenant and agree with the said P. P., his heirs and assigns, that the said T. T. and his heirs, the title to the said tract or parcel of land, with its appurtenances aforesaid, unto the said P. P., and his heirs and assigns, will warrant and forever defend against the claims of the said T. T. and his heirs, and of all persons claiming by, through, or under him or them.

Witness the hands and seals of the said parties, the day and year first above written.

T. T. [SEAL.]

P. P. [SEAL.]

☞ Certificate of acknowledgment for registry as in Form 41.

#### 54. *Deed of Release of a Deed of Trust.*—(*Sands' Forms*, 118.)

This indenture, made this ——— day of ———, in the year of our Lord 18—, between T. T. [*the trustee*] of the first part, D. D. [*the debtor*] of the second part, and O. C. [*the creditor*] of the third part: Whereas, by a deed dated the ——— day of ———, in the year 18—, and of record in the clerk's office of the ——— court of the ——— of ———, the said D. D., in order to secure to the said O. C. the payment of a certain bond for the sum of ——— dollars, executed by the said D. D., and payable to the said O. C., bearing date on the ——— day of ———, in the year ———, and payable on the ——— day of ———, in the year 18—, did convey in trust to the said T. T. and his heirs, a certain tract or parcel of land, with its appurtenances, set forth and described in said deed. And whereas the said bond has been fully paid, and the said D. D. desires that the said property should be released from the said deed of trust. Now, therefore, this indenture witnesseth, that the said T. T., in consideration of the premises, and for the further consideration of one dollar to him in hand paid at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and with the consent of the said O. C., testified to by his becoming a party to this indenture, and signing and sealing the same, doth grant, bargain and sell, assign, release and confirm unto the said D. D., and his heirs and assigns forever, the said tract or parcel of land, with its appurtenances and privileges set forth and described in the deed of trust aforesaid as follows, namely: [*copy the description as contained in the trust deed*.] To have and to hold the said premises and appurtenances unto the said D. D., and his heirs and assigns forever. And the said O. C. doth hereby release to the said D. D., and his heirs and assigns, forever, all his claim, title, right and equities, in and to the said premises and appurtenances.

Witness the hands and seals of the parties, the day and year first above written.

T. T. [SEAL.]

D. D. [SEAL.]

O. C. [SEAL.]

☞ Certificate of acknowledgment for registry, as in Form 41.

*55. Conveyance from Clerk to Purchaser of Land Sold for Taxes.*

(Sands' Forms, 119; V. C. 1873, c. 38, § 20.)

Know all men that, whereas a list of real estate within the county of —, sold in the month of —, in the year 18—, for the non-payment of taxes thereon for the years —, —, and —, with a certificate attached thereto of such oaths as is prescribed by the fourteenth section of chapter thirty-eight of the Code of Virginia of 1873, was returned to the court of the said county on the — day of —, in the year 18—, being the second term next after the completion of the said sales; and the said court seeing no cause to doubt the correctness of the said list, did order a copy thereof to be certified to the auditor of public accounts; And whereas by the said list it appears that — was charged with taxes to the amount of — dollars, and that the quantity of land represented to be charged with the said taxes was stated to be — acres of land, the local description of which was —, [insert the local description;] that the amount of taxes due thereon was —; that the quantity of land sold was —; that the said sale was made on the — day of —, in the year 18—; that the entire tract of land was sold; that the name of the purchaser was —, and the amount of purchase-money was —; and whereas the said purchaser had a report made by —, the surveyor of the said county of —, to the court thereof, according to the terms of the eighteenth section of said chapter thirty-eight of the Code of Virginia of 1873, and the said court, upon examination of the plat and certificate of the surveyor, made by the said surveyor and returned to the court, having found it to be correctly made, in conformity with said section eighteen, did, on the — day of —, 18—, order the same to be recorded; and whereas two years have expired since the said sale, and the purchaser of the said real estate alleging that the same has not been redeemed, has applied for a deed conveying the same to him: Now this deed witnesseth, that in consideration of the premises, and for the further consideration of one dollar to me in hand paid at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, I, C. C., clerk of the court of the said county of —, in pursuance of the twentieth section of chapter thirty-eight of the Code of Virginia of 1873, doth grant, bargain, sell, and convey unto the said P. P., the purchaser aforesaid, the said real estate so sold to him as aforesaid, and specified in the report, plat, and certificate so returned by the county surveyor as aforesaid.

Witness the following signature and seal.

C. C., Clerk, [SEAL.]

☞ Certificate of acknowledgment for registry as in Form 41.

*56. Deed of Separation, Husband allowing Wife an Annuity.*

(Grayd. Forms, 518; Tate's Forms, 277.)

This indenture, made this — day of —, in the year of our Lord, 18—, between H. H., of —, of the one part, and C. C., of —, and W., wife of the said H. H., of the other part; Whereas some unhappy differences have lately arisen between the said H. H. and W., his wife, and they have mutually agreed to live separate and apart from each other, and previous to such separation the said H. H. hath consented thereto, and also proposed and agreed that he, out of his own proper moneys and estate, would allow and pay the said W., during the term of her natural life, for her better support and maintenance, the annuity or yearly sum of — dollars, clear of all taxes, charges, and deductions whatsoever, payable to her



in such manner as hereinafter mentioned; subject, nevertheless, to the proviso hereinafter contained, respecting the payment of the said annuity. And also, that upon the death of the said W., the said H. H. will pay the personal representative of the said W., besides such arrears of the said annuity as may be then unpaid, the sum of — dollars, towards and for the purpose of defraying the charges of the funeral of the said W. Now THIS INDENTURE WITNESSETH, that the said H. H., in pursuance of his said proposal and agreement, doth hereby, for himself and his heirs, covenant and agree with the said C. O., and his assigns, in manner and form following, that is to say: That it shall and may be lawful for the said W., and that the said H. H. will suffer the said W., at all times henceforth during her natural life, to live separate and apart from him, and to sojourn, be and reside in such place and places, and family and families, and with relations, friends, and other persons, and to follow and carry on such trade and business as she, the said W., from time to time, at her will and pleasure (notwithstanding her coverture, and as if she was a *feme sole* and unmarried), shall think fit. And that of the children born to the said H. H. by the said W., his wife, the said H. H. will suffer — to live and remain with the said W., and in her custody and charge, whensoever, as often, and as long as the said W. shall think fit. [*Insert any other covenants touching the children of the marriage.*] And that the said H. H. shall not, nor will at any time or times hereafter, sue, molest, or trouble the said W. for so living separate and apart from him, or any other person or persons whatsoever for receiving, harboring, or entertaining her; nor shall, nor will, without the consent of the said W., visit her, or knowingly come into any house or place where she shall or may dwell, or reside, or be; or send or cause to be sent any letter or message to her, nor shall or will at any time hereafter claim or demand any of the moneys, rings, jewels, plate, clothes, linen, woollen, household goods, or stock in trade, which the said W. now hath in her custody, power, or possession, or which she shall or may hereafter acquire by purchase, gift, devise, bequest, or otherwise, and that she shall and may enjoy and absolutely dispose of the same as if she were a *feme sole* and unmarried. And further, that the said H. H., or his assigns, shall and will pay to the said W., or her assigns, during the term of her natural life, for and towards her better support and maintenance, an annuity or yearly sum of — dollars in gold, free and clear of all charges, taxes, assessments, and deductions whatsoever, the said annuity to be payable quarterly, in four equal instalments of — dollars each, on the — day of the months of —, —, —, and —, of each and every year, during the term aforesaid, which said sum of — dollars paid annually as aforesaid is to be in full satisfaction of and for the maintenance and support of the said W., and all alimony whatsoever to her during her life, as aforesaid. Provided always, and it is hereby expressly agreed and declared by and between the parties hereunto, and the true intent and meaning of these presents are, that the said H. H. shall be guaranteed, indemnified, and secured by the said C. O. against any debt, contract, or expense to be hereafter contracted by or on account of the said W.; and that in case the said H. H., or his personal representative, shall at any time hereafter be obliged to pay, and shall actually pay, any debt or debts which the said W. shall at any time hereafter, during her present coverture, contract or incur with any person or persons whatsoever, that then, and in such case, it shall be lawful for the said H. H., or his personal representative, to deduct and retain of the said annuity or yearly sum of — dollars, so hereby made payable as aforesaid to the said W., all and every such sum, and sums of money as he shall be obliged to pay, and shall actually pay, for or on account of any such debt as aforesaid, contracted or incurred by the said W.,

together with all costs, charges, and damages which he may sustain on account thereof, and thus to reimburse himself for such sum or sums of money, anything herein contained to the contrary notwithstanding.

Witness the following signatures and seals.

H. H. [SEAL.]

C. C. [SEAL.]

W. H. [SEAL.]

☞ Certificate of acknowledgment, &c., for registry as in Form 40.

### 57. *Claim of Mechanic's Lien.*

(V. C. 1873, c. 115, § 3, 4; *Ante*, p. 68; Grayd. Forms, 859 & seq; *Ante*, Forms 28 and 29.)

Virginia:

In the clerk's office of the county [or *corporation*] court for the county [or *corporation*] of —, on the — day of —, in the year 18—.

O. C., house-carpenter, of the — of —, files this his claim for the payment of — dollars, against all that certain — story — building, situate and being in the — of —, on — street, containing in front, on said — street, — feet, and in depth — feet, and the lot or piece of ground and curtilage appurtenant to said building, the said sum of — dollars, being a debt contracted for work, to-wit: carpenter's work, &c., and materials, viz: bricks, sand, lime, lumber, ironmongery, &c., done and furnished by the said O. C., for and about the erection and construction of said building and appurtenances, of which a certain O. C. was and is the owner, or reputed owner, and at his instance and request, the said O. C. being the general contractor, architect, and builder thereof; which said work, in and about the premises aforesaid, was completed within thirty days next before the filing of this claim. And the said O. C. claims to have a lien on the said building, and the lot or piece of ground and curtilage appurtenant to said building, from the commencement thereof, for the sum aforesaid, according to the statute in such case made and provided; and the said claimant hereto annexes a bill of particulars of the amount of his said debt, showing the nature and kind of work done, the kind and amount of materials furnished, and the time when the said work and materials were done and furnished.

Witness my hand, the day and year first above written.

C. C.

O. O.

☞ Certified as registered by clerk.

[Mechanic's bill annexed.]

### 58. *Agreement for Lien on Crops.*

(*Ante*, p. 70; V. C. 1873, c. 115, § 12.)

Whereas, F. F., of —, is engaged [or, "*is about to be engaged*"] in the cultivation of the soil, during the year ending on the — day of —, 18—, in and upon a certain tract or parcel of land lying in the county of —, now in the occupancy of —, and adjacent to the lands of —, —, —, and others, and M. M., of — hath agreed to advance to the said F. F. the sum of — dollars, and if need be, additional sums, not to exceed in the whole the sum of — dollars, which money is intended to be expended in the cultivation of the said tract or parcel of land, for which sum or sums so advanced by the said M. M., he is to be entitled to a lien, according to law, on the crops which may be made by the said F. F., on the said tract or parcel of land, during the

year aforesaid. Now, this deed, made between the said M. M., of the one part, and the said F. F., of the other part, witnesseth that it is agreed between the said parties that the said M. M. shall make advances of money to the said F. F., in such sums and at such times as he may demand and require, to an amount not exceeding in the whole the sum of ——— dollars in gold, which is intended to be expended in the cultivation of the tract or parcel of land aforesaid, and which the said F. F., for himself and his heirs, agrees to repay in gold, to the said M. M., or his assigns, on or before the ——— day of ———, 18—, with lawful interest on the several advances aforesaid, from the time when they were respectively made, until payment. And it is further agreed by and between the said parties, that the said M. M. shall be entitled to a lien, according to the statute in that case made and provided, to the extent of the advances which he shall make as aforesaid to the said F. F., on all the crops which may be made by the said F. F. on the said tract or parcel of land, during the year aforesaid, ending on the ——— day of ———, 18—.

Witness the hands and seals of the said parties, this ——— day of ———, in the year of our Lord, ———.

M. M. [SEAL.]

F. F. [SEAL.]

☞ Certificate of acknowledgment for registry, as in Form, 41.

### 59. *Will Bequeathing Portions to Wife and Children, and Appointing Guardian to Minors.*

(2 Min. Insta. 912 & seq; *Ante*, p. 73, 76, 94; Grayd. Forms, 557; Sands' Forms, 259; Tate's Forms, 254.)

In the name of God, Amen. I, T. T. of ———, do make this, my last will and testament, as follows:

I direct that my body be decently buried, in a manner corresponding to my estate and situation in life, but with as little expense as may be, consistently therewith.

And as to such worldly estate as I may die seised or possessed of, I dispose of the same as follows:

1. First, I give all my real estate whatsoever, situate and being in ———, with the appurtenances thereto belonging, unto my dear wife, J. T., for and during her life; and I give her also as her own forever, all the rents which shall be due and owing to me at my death for the said real estate; I also give her in fee-simple, all my household-goods and furniture, plate, china-ware, household-linen, books, paintings and prints, together with all the utensils of every sort, and all the provision and supplies of all kinds, in or belonging to my house in ———, where I now reside.

2. Secondly, from and after the decease of my said wife, I give and devise the said real estate to my eldest son, W. T., and his heirs forever.

3. Thirdly, I give and devise all that tract or parcel of land lying in the county of ———, which I purchased from S. S., unto my son, H. T., and his heirs forever; and I also give to my said son, H. T., all the rents which may be due and owing to me at my decease, for or issuing out of the same.

4. Fourthly, I give and bequeath unto my daughter, C. T., and my son, R. T., both minors, the sum of ——— dollars each, to be paid them respectively, upon their attaining severally the age of twenty-one years; the same to be immediately upon my death invested securely, and the profits employed in the proper main-

tenance and education of my said two children respectively, and the surplus, if any, remaining from year to year, to accumulate for their benefit severally, and to be also securely invested, and the proceeds employed and to be disposed of in like manner.

5. Fifthly, And as to all the residue of my estate, real and personal, which shall remain after payment of the expenses of my funeral, and my debts, and after satisfying and liquidating the devises and legacies aforesaid, I give, devise and bequeath the same to my said son, W. T., and his heirs forever.

6. Sixthly, I appoint my wife, J. T., guardian, during their respective minorities, of such of my children as, at the time of my death, shall be under the age of twenty-one years; and I desire that no security shall be required of her as such guardian.

7. Seventhly, I appoint my said wife, J. T., executrix of this my will, and desire that no security shall be required of her as such.

8. Eighthly, I hereby revoke all previous wills and codicils hitherto made by me.

Witness my hand this ——— day of ———, in the year of our Lord, ———.

T. T.

Signed and published by T. T., as and for his last will, in the presence of us, who in his presence, and in the presence of each other, have hereunto subscribed our names as witnesses.

E. E.

W. W.

#### 60. *Will with more Complex Provisions.*

(Tate's Forms, 249; Grayd. Forms, 559, &c.)

In the name of God, Amen. I, T. T. of ———, do make this, my last will and testament, as follows:

1. First, I desire that my body may be decently buried, without needless expense, in a manner corresponding to my estate and my situation in life.

2. Secondly, I direct that all my just debts be paid as soon after my decease as conveniently may be, and to that end charge my whole estate, real and personal, with the same.

3. Thirdly, I give to my dear wife, J. T., in testimony of my affection for her, the sum of ——— dollars in gold, as her own absolutely, and to be preferred to any of the devises and legacies hereinafter contained.

I do also give and bequeath to her, for her own absolute use, and do charge my whole estate, real and personal, except that which is disposed of by the fourth clause of this my will, with the payment thereof, the clear annual sum of ——— dollars in gold, to be paid to her, or her assigns, by half yearly payments, during each and every year of her natural life that she may continue my widow, but no longer; the first payment thereof to be made six months from my decease.

I do also give and bequeath to her, as her own absolutely, all my household goods and furniture, plate, china-ware, household-linen, books, paintings and prints, together with all the utensils of every sort, and all the provisions and supplies of all kinds, in or belonging to my house in ———, where I now reside, or where I shall reside at the time of my death.

I do also give to my said wife, full and competent authority and power, provided she shall continue and die my widow, by her last will in writing, duly executed as a will, to dispose and appoint the payment of the aforesaid annuity of ——— dollars, or any part thereof, to such person or persons as she shall think

ft, for any term or terms, not exceeding ——— years from the date of her decease.

4. Fourthly, I give, devise and bequeath to my executors hereinafter named, their heirs and assigns, all my lands, tenements, and messuages situate and being in ———, and ———, with the appurtenances thereto belonging or appertaining, together with all the fixtures, live and dead stock, carriage horses, horses, mules, oxen, cattle, furniture, agricultural and other implements of all kinds, commonly used therewith, saving what may have been already herein-before given to my said wife; to hold to my said executors, and their heirs and assigns for ever; but UPON TRUST nevertheless that they shall and will, with all convenient speed, either by private contract or public auction, in such manner as they shall be best advised, proceed to sell the same for the most money that can be gotten therefor, and to convey, release, confirm, assure and assign the same to the best purchaser, when and so soon as the whole purchase-money is paid, and not before, by such deeds or writings as they shall be advised by legal counsel; and then as to the moneys arising from such sale, upon trust that they shall apply the same in manner following: that is to say, that they shall invest the said moneys in some secure and interest-bearing stock or stocks, taking care in their investments to regard safety as an indispensable element and condition, and to that end selecting those stocks which do not hold out the promise of more than a moderate profit, and to hold such stock or stocks, with all interest, dividends and profits to accrue thereon, for and upon the several uses and purposes hereinafter expressed; that is to say, upon trust to pay the said interest, dividends and profits arising from such investments, as and when they shall be received, to and for the sole and separate use of my daughter, D. D., (who intermarried with H. D.), and her assigns, and not to be subject to her husband's debts or control, for and during the term of her natural life.

And from and after her death, upon trust, to pay the interest, dividends and profits aforesaid, to the said H. D., for and during the term of his natural life.

And from and after the decease of the survivor of the said D. D. and H. D., without leaving any issue of my said daughter D. D., by her said husband, or leaving any such, in case they all happen to die before attaining the age of twenty-one years, being sons, or being daughters, the said age or previous marriage, with such consent as after mentioned; Then upon trust to assign and transfer all the said capital stock or stocks to be purchased as aforesaid, and all interest, dividends and profits thereon to accrue and to become payable, to the account of the residue of my estate hereinafter disposed of.

But in case the said H. D. and D. D. his wife shall die, leaving any such child or children, who shall live to the age of twenty-one years, being a son or sons, or being a daughter or daughters, their said age or previous day of marriage, with the consent of their said father and mother, or the survivor of them respectively, then from and after the decease of the said H. D., and D. D. his wife, upon trust, to assign the said capital stock so to be purchased as aforesaid, and all interest, dividends and profits thereon to accrue, and to become due and payable from thenceforth, to and amongst all such child or children, at and when they shall respectively attain such age, being sons, or being daughters, their said age or previous marriage, with such consent as aforesaid, his, her or their heirs for ever, in equal shares and proportions. And in the meantime, until they shall respectively attain such age or previous marriage, in trust, to apply the interest, dividends and profits thereof, in and towards their respective maintenance and education, share and share alike.

And in case any or either of such child or children shall happen to die during

his or their minority, being a son or sons, or being a daughter or daughters, during her or their minority, or previous to marriage during such minority with such consent as aforesaid. Then upon trust to pay, assign and transfer the whole of the share or proportion, or shares and proportions of the said stock or stocks, and all dividends, interest and profits thenceforth to accrue and become payable thereon, of and belonging to such child or children so dying, to and for the use of the survivor or survivors of them, in equal shares and proportions, if more than one, and if but one, then the whole to and for the use and benefit of such child, his, her or their heirs for ever, and when his, her or their own share or shares thereof shall become payable and transferable.

And in case all such child or children shall happen to die before attaining such age or previous marriage with such consent as aforesaid, then from and immediately after the decease of the longest liver of them, and after the decease of the said H. D. and D. D. his wife, and the survivor of them, in trust to transfer and assign the said capital stock or stocks so to be purchased, with all or any accumulations thereof, and all interest, dividends and profits thenceforth to accrue and become payable thereon, to the account of the residue of my estate herein-after disposed of.

5. Fifthly, I give and bequeath to my sister, V. S., the sum of ——— dollars in gold, to be charged upon and issue out of the residue of my personal estate, and not out of my real estate, or any part thereof.

6. Sixthly, As to all the rest and residue of my estate, as well real as personal, wheresoever situate and being, and of whatsoever nature or kind, and not hereinbefore given, bequeathed and devised, I do hereby give, devise and bequeath the same, and every part thereof, subject to the payment of my funeral expenses, just debts, and charges of proving and carrying into effect this my will, and to the payment of the annuities and legacies hereinbefore charged on my estate, or any part thereof, unto my two sons, A. T. and J. T., and their heirs for ever, in equal shares and proportions.

7. Seventhly, I do appoint E. E. and F. F., to be executors of this my last will and testament; and I direct that they shall neither of them be required to give any security for the faithful execution thereof.

8. Eighthly, I hereby revoke all other and former wills or codicils, by me at any time heretofore made.

Witness my hand, which I have set to this my will, written upon ——— sheets of paper, signing every sheet thereof, this ——— day of ———, in the year ———.

T. T.

Signed, published and declared by T. T., as and for his last will, in the presence of us, who in his presence, at his request, and in the presence of one another, have hereto subscribed our names as witnesses.

R. R.  
W. W.

### 61. *Will with Sundry Limitations.*

(Davis' Crim. Law, 648; Oliver's Convey. 562.)

I, T. T., considering the uncertainty of life, (or "*being sick and weak in body, but of sound and disposing mind,*") do make this my last will and testament, hereby revoking all former wills by me at any time made.

1. I direct that all my just debts shall be paid; and if the debts due me, and the proceeds of the sale of my perishable property be insufficient for that purpose, my

executors are authorized to sell so much of my other estate, real and personal, as may be necessary.

2. I give and devise to my wife, J. T., my mansion-house in the — of —, with all the plate and household furniture and goods of every description therein, together with the tract of land annexed thereto [*which, if the extent be at all uncertain, should be so described as to ascertain how much is included in the devise*]; and all the horses, mules, oxen, cattle, and stock of every kind; carriages, wagons, carts, agricultural and other implements, and goods of all kinds used upon the said land; growing crops, and provisions of all sorts laid in for family consumption; to have and to hold the same in fee-simple, [or “*to have and to hold the same, except the growing crops and provisions, which I give to her in absolute property, for and during her life, or so long as she remains my widow.*”] And I do hereby declare that this, and subsequent provisions made herein for my wife, shall be in lieu of her dower and distributive share in my estate.

3. I give and devise to my son R., in fee-simple, my tract of land in — county, commonly known by the name of —, including not only the tract originally so called, but the lands adjoining, purchased by me of —, and since occupied, together with the said tract, as one estate, with all the horses, mules, oxen, cattle and stock of every kind, agricultural and other implements, and goods of all kinds, and growing crops thereon; upon condition that, within two years from my death, he pay to my son J., or his assigns, the sum of — dollars, with lawful interest thereon from my death. And on his failure to do so, I give and devise to my said son J., on the expiration of the said period of two years, a moiety of the said land, stock and growing crops, to hold in fee-simple; and the other moiety thereof I give and devise to my son C. T., in fee-simple.

4. I give and devise to my son H. and his heirs, my tract of land in — county, purchased by me of —; but if my said son should die without lawful issue [or “*under age and without lawful issue*”], in that event, I devise the said land to my nephew, N. N., and his heirs forever.

5. I give and devise to my friend, F. F., during the joint lives of my daughter, M. L., and her husband, H. L., and the life of the survivor of them, my tract of land in — county, commonly known by the name of — with all the horses, mules, oxen, cattle and stock of every kind, agricultural and other implements, and personal chattels of all sorts, and growing crops thereon, upon the special trust that he shall, during the continuance of his said estate, manage the said land, and take and receive the rents and profits accruing from the said land and the personal property aforesaid, and pay all taxes and levies thereon, together with the necessary charges and expenses attending the same, and the management thereof; and after deducting such payments, shall pay over annually, at such times and in such modes and proportions as he shall deem most expedient, the residue of the said costs and profits to my said daughter, to her sole and separate use, free from the debts and power of her husband. And upon the death of the said H. L., if my said daughter shall survive him, I give and devise to her in fee-simple, the said tract of land and personal chattels. But if my said daughter should die before her said husband, in that case, I direct that the said F. F. shall hold and manage the said tract of land and personal chattels in trust for the use and benefit of the said H. L., during the residue of his natural life, as before he held and managed it for the use of the said M. L.; and after the death of the said H. L., I give and devise the said tract of land, and the personal chattels aforesaid, to the children of the said M. L. living at her death, and the descendants of such of them as may be dead, and their heirs. And I hereby include in, and declare to be subject to the dispositions and limita-

tions contained in this clause, whatever interest and share my said daughter, M. L. would otherwise take under the eighth clause of this my will.

6. I give and devise to my two daughters, L. and E., in fee-simple, my tract of land in — county, commonly known by the name of —, with all the horses, mules, oxen, cattle, stock of all kinds, agricultural and other implements, goods and chattels, and growing crops thereon, at the time of my death, to be equally divided between them when either of them shall arrive to the age of twenty-one years, or marry. And in the meantime, I direct that the profits thereof, or so much thereof as may be necessary, shall be equally applied by their guardian to their maintenance and education, the annual surplus, if any, to accumulate for their joint benefit. I also give to them — shares of stock held by me in the —; the profits of which I direct shall be appropriated in like manner.

7. I give and devise to my executors my lot on — street, in the city of —, known in the plan of said city as lot number —, to be sold by them when, in their opinion, it can be most advantageously done, and on such terms as they shall think most expedient; the proceeds whereof I desire that they shall lend out on good real security, or invest in safe interest-paying stocks, at their discretion. One-third of the annual interest or profits thence accruing, and of the rent of the said house and lot until the sale thereof, I give to my said wife, J. T., during her life, [or "*so long as she remains my widow*,"] and the remaining two-thirds I direct to be annually paid by my executors to the guardian of my son P., until he arrives to the age of twenty-one years, to be applied to his support and education; and on his arriving at such age, I give to him in fee-simple two-thirds of the proceeds of the said house and lot, however or in whatever invested; and on the death [or marriage] of my said wife, the other third thereof in absolute property. Should he die before arriving at full age, unmarried and without issue, I direct that what is herein given to him shall be considered as included in the eighth clause of this my will.

8. All the rest and residue of my estate, not herein disposed of, of every description in possession, expectancy, or action, [including the estate comprehended in the second clause of this my will, upon the death or marriage of my wife,] I give and devise to be equally divided among all my children living at my death, and the descendants of such of them as may be dead, subject to the qualification contained in the fifth clause of this my will.

9. I appoint my sons B. and H. executors of this my will, and I desire that they shall not be required to give security upon their qualification.

10. I appoint by wife, J. T., the guardian of my infant children until they arrive at the age of twenty-one years; provided she so long continue my widow. But if she marry again her guardianship shall thereupon cease and determine, and in that case I appoint my sons B. and H. to be the guardians of my children in her stead.

In witness whereof I have to this my will, consisting of — sheets of paper, set my hand to each sheet, this — day of —, in the year of our Lord, —.

T. T.

Signed, published, and declared by T. T., as and for his last will, in the presence of us, who, in his presence and at his request, and in the presence of one another, have hereunto signed our names as witnesses thereto.

B. R.

W. W.



62. *Codicil to a Will.*

(Dav. Cr. Law, 645; Oliver's Conv. 602 &amp; seq; Tate's Forms, 259.)

Whereas I, T. T., have made my last will in writing, bearing date, &c. Now, I do hereby make this codicil thereto, to be taken as part thereof, [or, if the codicil be written on the same sheet, say thus, "*I, the within named T. T., do make this present codicil to my within will, which is to be taken as part thereof.*"] I do hereby revoke the devise and bequest, contained in the ——— clause of my said will to ———; and in lieu thereof, I give and devise to him, &c. And I do hereby give and devise to, &c.

In witness whereof, I have hereto affixed my hand, this ——— day of ———, 18—.

T. T.

Signed, published and declared by T. T., as and for a codicil to his last will, in the presence of us, who in his presence and at his request, and in the presence of one another, have hereunto signed our names as witnesses thereto.

R. R.

W. W.

63. *Nuncupative or Verbal Will.*

(Grayd. Forms, 559; Sand's Forms, 261; Tate's Forms, 260.)

Be it remembered, that on the ——— day of ———, in the year 18—, T. T., a mariner or seaman, being at the time at sea, (or, T. J., being at the time a soldier in actual military service,) did, in the presence of us, who have hereto subscribed our names as witnesses, declare his last will, and did desire us as witnesses, to take notice of the same as his will, as follows, namely: that his will was that his wife, Mary T. should have all arrears of pay or wages due to him; that his son J. should have ——— dollars of the deposit belonging to him in ——— Savings Bank at ———, and his daughter M. should have the remainder of such deposit, including the interest upon the whole deposit now in arrear, and to become due hereafter; and that his wife Mary should be his executrix, without giving security. [Reciting the substance accurately, and the *very words*, as far as may be.]

In testimony whereof we have subscribed our names to this writing, which contains, as above stated and set forth, the last will of the said T. T., made as aforesaid. Written and signed by us this ——— day of ———, 18—.

R. R.

W. W.

64. *Affidavit for Warrant of Distress for Rent reserved in Money.*(V. C. 1878, c. 184, § 10; Dav. Cr. Law, 597; Mayo's Guide, 568; *Ante*, p. 112.)

Virginia,

County [or "*Corporation*"] of ———, to-wit:

This day L. L. [or "*A. A., agent of L. L.*"] made oath before me, R. W., a justice of the peace in and for the said county [or "*corporation*"] that he verily believes that D. D. is justly indebted to him [or "*to the said L. L.*"] in the sum of ——— dollars, with lawful interest thereon from the ——— day of ———, 18—, until paid, for ——— years' rent due and in arrear, reserved upon contract,

for certain lands (or a certain messuage and tenement), situated in the County [or "Corporation"] of ——— (\*). Given under my hand, this ——— day of ———, 18—.

R. W., J. P.

☞ If the rent be granted, say, instead of "reserved upon contract," &c., "granted by contract to issue out of certain lands [or out of a certain messuage and tenement] situated," &c.

### 65. Warrant of Distress for Rent reserved in Money.

(V. C. 1873, c. 134 § 10; *Ante*, p. 112; *Dev. Cr. Law*, 597; *Mayo's Guide*, 568.)  
Virginia,

County [or "Corporation"] of ———, to-wit:

Whereas L. L. [or "A. A., agent of L. L."] has made oath before me, R. W., a justice of the peace in and for the said County [or "Corporation"] of ———, (or "before V. Y., a justice of the peace in and for the County of ———") that he verily believes that D. D. is justly indebted to him (or "to the said L. L.") in the sum of ——— dollars, with lawful interest thereon, from the ——— day of ———, 18—, until paid, for ——— years' rent due and in arrear, for rent reserved upon contract, for certain lands [or "a certain messuage and tenement"], situated in the said County [or "Corporation"] of ——— (\*); These are, therefore, in the name of the Commonwealth, to require you forthwith to distrain so much of the goods and chattels of the said D. D. in and upon the said premises, or not removed therefrom more than thirty days, as shall be sufficient to satisfy the rent due and in arrear as aforesaid, with interest thereon as aforesaid, and the costs of distress, (†) and therewith to proceed according to law. Given under my hand, this ——— day of ———, 18—.

R. W., J. P.

To the Sheriff [or "Sergeant"], or any Constable  
of the County [or "Corporation"] of ———.

### 66. Affidavit for Warrant of Distress for Rent reserved in Kind.

(V. C. 1873, c. 134, § 15; *Ante*, p. 114.)

[Pursue Form 64 down to (\*), and then add]—"the foregoing sum of ——— being the value, as the affiant believes, of the one ———th part of the crops and produce of the said premises during the said ——— years, in which said part of the said crops and produce the said rent was reserved. Given, &c.," [as in Form 64 to end.]

### 67. Warrant of Distress for Rent reserved in Kind.

(V. C. 1873, c. 134, § 15; *Ante*, p. 114.)

[Pursue Form 65 down to (\*), and then say]—"the foregoing sum of ——— dollars, being the estimated value of the one ———th part of the crops and produce of the said premises, during the said ——— years, in which said part of the said crops and produce the said rent was reserved. These are, therefore, [as in Form 65 to (†), and then say]—and to secure the goods and chattels so distrained in your hands, or so provide that the same may be liable to further proceedings thereon to be had at the next court of the said county [or "corporation"] when and where you are to make return how you have executed this warrant. Given under my hand, this ——— day of ———, 18—.

R. W., J. P."

To the sheriff, &c., [as in Form 65.]

68. *Form of Notice to Tenant to ascertain the Value of Chattels, Distrained or Attached.*

(V. C. 1873, c. 134, § 15; *Ante*, p. 114.)

To Mr. D. D.:

Whereas certain goods have been by J. B., deputy for L. M., sheriff of the county, [or "*sergeant of the corporation*"] of ———, distrained [or "*attached*"] for rent, payable by you to me, reserved upon contract in a share of the crop or produce of certain premises, [or *in any other thing or commodity but money*], in the said county [or "*corporation*"], occupied by you as my tenant, you are hereby notified that on the ——— day of the next term of the county [or "*corporation*"] court of the county [or "*corporation*"] of ———, I shall move the said court to ascertain the value of the said share of the crop and produce aforesaid, [or *whatever other thing the rent is reserved in,*] so reserved, and to order the goods so distrained [or "*attached*"] as aforesaid, to be sold in order to pay the amount so ascertained.

L. L.

69. *Forthcoming or Delivery Bond in Case of Distress.*

(V. C. 1873, c. 185, § 1; *Ante*, p. 117.)

Know all men that we, D. D. and J. S., are held and firmly bound unto L. L., in the sum of ——— dollars, [*double the value of the goods levied upon.*] To the payment whereof, to be made to the said L. L., in gold, we bind ourselves and our heirs jointly and severally, by these presents. Sealed with our seals, and dated this ——— day of ———, in the year of our Lord, 18—.

The condition of the above obligation is such that whereas the above named L. L. obtained, in due form of law, on the ——— day of ———, 18—, from one R. W., a justice of the peace, in and for the county [or "*corporation*"] of ———, a warrant of distress directed to the sheriff [or "*sergeant,*"] or any constable of the county [or "*corporation*"] of ———, for taking the goods and chattels of the above bound D. D., to satisfy the said L. L., the sum of ——— dollars, with lawful interest thereon, from the ——— day of ———, 18—, until paid, for rent reserved upon contract, and the costs of distress; which warrant, with the legal costs attending the same, amounts to the sum of ——— dollars. And whereas J. B., deputy for L. M., sheriff of the said county, [or "*sergeant of the said corporation*"] [or "*whereas K. K., a constable of the said county [or 'corporation,']*"] of ———, by virtue of the said warrant, hath taken the following property, belonging to the said D. D., to satisfy the same, to-wit: [*Insert the property levied on.*] And the said D. D. being desirous to keep the said property in his possession, and at his risk, until the day of sale thereof, hath tendered the above bound J. S. as security for the forthcoming and delivery thereof, on the day, and at the place of sale. Now, if the said D. D. shall deliver the said goods and chattels to the said, [*the officer who levied the warrant, as above described,*] at the [*place and time appointed by the officer for the sale, Ante, Form, 20,*] [or, if the distress be for rent reserved in kind, say, "*at such place and time as shall be appointed for such sale by the court of the said county [or 'corporation,'] to which court, at its next term, the said warrant is made returnable,*"] then and there to be sold to satisfy the said warrant of distress, then the above obligation to be void; otherwise to remain in full force and virtue.

D. D. [SEAL.]

J. S. [SEAL.]

☞ The student will remember that this bond, where the tenant is aggrieved

by the distress, because the rent is not due in whole or in part, or because the distress is otherwise illegal, is *expected to be forfeited*, and is made with that intent. Accordingly, in such a case, when by the contemplated non-delivery of the chattels, the condition of the bond is broken, and the landlord gives notice to the tenant of a motion against him in court, for an *award of execution* on the bond, the tenant appears and makes defence by showing that the "distress was for rent not due in whole or in part, or was otherwise illegal." (V. C. 1873, c. 185, § 4; *Ante*, p. 117.)

#### 70. *Affidavit for Attachment for Rent.*

(V. C. 1873, c. 148, § 4, 6, &c.; *Ante*, p. 124 & seq; Mayo's Guide, 568; Dan. Attachments, 232.)

Virginia:

County [or "*Corporation*"] of —, to-wit:

This day L. L. [or A. A., *agent for L. L.*] made oath before me, R. W., a justice of the peace in and for the county [or "*corporation*"] aforesaid, that D. D. is the tenant of the said L. L., and is liable to him for rent reserved upon contract for certain premises, situated in the county [of "*corporation*"] of —, in money, to the amount of — dollars, [or "in the one —th part of the crops and produce of said premises, which the said affiant estimates and verily believes to be of the value of — dollars,"] payable within one year, at the times following, to-wit: [*specifying the times when each portion of the rent will fall due within the year*] of which the said L. L. has received no part; and that the said affiant verily believes that the said D. D. intends to remove [or "is removing," or "within thirty days last past has actually removed,"] his effects from the leased premises before the times of the payment of the rent aforesaid; and that [there is not, or] unless an attachment issues, there will not be left on such premises property liable to distress sufficient to satisfy the rent so to become payable. Given under my hand, this — day of —, 18—.

R. W., J. P.

#### 71. *Attachment for Rent.*

(V. C. 1873, c. 148, § 4, 6, &c.; *Ante*, p. 124 & seq; Mayo's Guide, 568; Dan. Attachments, 238.)

Virginia:

County [or "*Corporation*"] of —, to-wit:

Whereas, L. L. [or "A. A., *agent for L. L.*"] has this day made oath before me, R. W., a justice of the peace in and for the said county [or "*corporation*"], that D. D. is his tenant, and is liable to the said L. L. for rent reserved upon contract, for certain premises situated in the county [or "*corporation*"] of —, in money to the amount of — dollars, [or "in the one —th part of the crops and produce of said premises, which the said affiant estimates, and verily believes, to be of the value of — dollars"], payable within one year at the times following, to-wit: [*specify the times when each portion of the rent will fall due within the year*], of which the said L. L. has received no part; and that the said affiant verily believes that the said D. D. has, within thirty days last past, actually removed [or "is removing," or "intends to remove"] his effects from the leased premises before the times of the payment of the rent aforesaid, and that there is not [or "unless an attachment issues there will not be"] left on such premises property liable to distress sufficient to satisfy such rent so to become payable. These are, therefore, in the name of the Commonwealth, to require you to attach such goods of the said D. D., or of his assignee, or under-tenant, as might be dis-

trained for the said rent if it had become payable, and any other estate, persona or real, of the said D. D., or so much thereof as will be sufficient to satisfy the said L. L. the rent aforesaid, and that you secure the said goods and estate so attached in your hands, or so provide that the same may be liable to further proceedings thereon, to be had at the next term of the county [or "*corporation*," or "*circuit*"] court of the said county [or "*corporation*"] when and where you are to make return how you have executed this warrant. Given under my hand, this — day of —, 18—.

R. W., J. P.

To the Sheriff [or "*Sergeant*"], or any Constable  
of the County [or "*Corporation*"] of —.

¶ If the amount do not exceed \$20, exclusive of interest, it is believed that the attachment is returnable before a justice of the peace, and the form must be modified accordingly. (See *Ante*, p. 125; V. C. 1873, c. 148, § 29; Id. c. 147, § 1.)

## 72. *Bond by Lessor, on Attachment for Rent, to Pay Costs and Damages.*

(V. C. 1873, c. 148, § 8; Id. c. 12, § 6; *Ante*, p. 125; Mayo's Guide, 569.

Know all men by these presents, that we, L. L. and S. S., are held and firmly bound, jointly and severally, unto the Commonwealth of Virginia in the just and full sum of — dollars, [*at least double the amount claimed*] in gold, to be paid to the said Commonwealth. Sealed with our seals, and dated this — day of —, in the year of our Lord —.

The condition of the above obligation is such, that whereas the said L. L. did, on the — day of —, in the year of our Lord, 18—, upon his complaint on oath, made in due form before R. W., a justice of the peace of the county [or "*corporation*"] of —, obtained from the said R. W. an attachment against the goods and chattels and other estate of one D. D. for the sum of — dollars, for rent to become payable by the said D. D. to the said L. L. within one year from the said date, in the manner following, that is to say, [*state the times of payment as in attachment*], which said attachment is directed to the sheriff of the said county, [or "*sergeant of the said corporation*,"] of —, or any constable thereof, and is made returnable to the court of the said —, [or if the sum exceed not \$20, say — "at — in the said county [or "*corporation*,"] on the — day of —, in the year of our Lord, —, before the said R. W., or some other justice of the peace of the said county [or "*corporation*,"] and whereas the said L. L. desires the officer executing the said attachment to take possession of the property attached in pursuance thereof. Now, therefore, if the said L. L. shall pay all costs and damages which may be awarded against him, or sustained by any person, by reason of his suing out the said attachment, then the above obligation to be void, otherwise to remain in full force.

L. L. [SEAL.]

S. S. [SEAL.]

## 73. *Replevy Bond by Tenant, taken by the Officer, and Releasing the Attachment.*

V. C. 1873, c. 148, § 13; *Ante*, p. 125; Mayo's Guide, 576.

Know all men by these presents, that we, D. D. and S. S., are held and firmly bound unto L. L., in the just and full sum of — dollars, [*at least double the*

*amount or value for which the attachment is issued,*] in gold, to be paid to the said L. L., &c., [as *supra*, in Form 72.]

The condition of the above obligation is such that whereas the said L. L. did, on the — day of — in the year of our Lord, 18—, upon his complaint on oath, made in due form of law before R. W., a justice of the peace of the county [or "corporation,"] of —, obtain from the said R. W. an attachment against the goods and estate of the said D. D., for the sum of — dollars for rent, to become payable by the said D. D. to the said L. L. within one year from the said date, in the manner following, that is to say, [state the times of payment as in the attachment,] which said attachment is directed to the sheriff of the said county [or "sergeant of the said corporation"] of —, or to any constable thereof, and is made returnable to the court of the said county [or "corporation,"] [or if the sum do not exceed \$20, exclusive of interest, say — "at — in the said county [or "corporation,"] on the — day of — in the year of our Lord 18—, before the said R. W., or some other justice of the peace for the said county [or "corporation,"]";] and whereas the following property and estate of the said D. D. has, by L. M., the sheriff of the said county, [or *whatever other officer may have made the levy,*] been attached by virtue of the said attachment, to-wit, [specify the property levied on, e. g., "six head of horses, five cows, four bedsteads, four mattresses of hair, four of shucks, twelve blankets, &c.,"] (\*) and the said D. D., being desirous to release from the said attachment the property and estate so attached, has tendered the above bound S. S. as his surety, in such a bond as the law requires for that purpose. Now, therefore, if the said D. D. shall perform the judgment of the said court [or "justice"] in case said attachment be sustained, then the above obligation to be void, otherwise to remain in full force.

D. D. [SEAL.]

S. S. [SEAL.]

#### 74. Form of Forthcoming or Delivery Bond by Tenant, &c.

(V. C. 1873, c. 148, § 13; *Ante*, p. 125, &c.; Mayo's Guide, 107.)

[Pursue form 73 to (\*), and then proceed as follows]: and the said D. D. being desirous to keep the said [naming the personal chattels in possession which were levied on] so attached as aforesaid, in his possession, and at his risk, [or if the bond be not given at the time of the levy, but afterwards, say, "being desirous to have restored to his possession the property so levied on, to be at his risk,"] has tendered the above-bound S. S. as his surety, in such a bond as the law requires for that purpose. Now, therefore, if the said D. D. shall have the said property so levied on and attached as aforesaid forthcoming, at such time and place as the said court [or "justice"] may require, the above obligation to be void, otherwise to remain in full force.

D. D. [SEAL.]

S. S. [SEAL.]

#### 75. Forthcoming or Delivery Bond by Garnishee on Attachment for Rent upon making the Levy.

(V. C. 1873, c. 148, § 13; Mayo's Guide, 101; *Ante*, p. 125.)

Know all men by these presents, that we, G. G. and S. S., are held and firmly bound unto L. L., in the just and full sum of — dollars, [usually double the estimated value of the property,] in gold, to be paid to the said L. L., his executors and administrators; to which payment, well and truly to be made, we bind

ourselves, and our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this — day of —, in the year of our Lord —.

The condition of the above obligation is such, that whereas, the said L. L. did, on the — day of —, in the year of our Lord —, upon his complaint on oath, made in due form of law, before R. W., a justice of the peace, in and for the county [or "*corporation*"] of —, obtain from the said R. W. an attachment against the goods and chattels and estate of one D. D., for the sum of — dollars, for rent reserved upon contract, and to become payable within a year from that date, to the said L. L., as specified in the said attachment, that is to say, [*state the times at which the rent will be payable,*] which said attachment is directed to the sheriff of the said county [or "*sergeant of the said corporation*"] of —, or to any constable thereof, and is made returnable to the — court of the said county [or "*corporation*"] of —, [or if the amount, exclusive of interest, is not over \$20, say, "at —, in the said county [or "*corporation*"] on the — day of —, in the year of our Lord —, before the said R. W., or some other justice of the peace of the said county [or "*corporation*,"]"] and whereas, by virtue of the said attachment, L. M., the sheriff of the said county [or "*sergeant of the said corporation*"] of —, (the said R. W., having taken from the said L. L. such bond and security as the law in that case requires,) has levied the said attachment on one mule and cart, and the harness pertaining thereto, as the property of the said D. D., being in the possession of the said G. G., and also on a debt of — dollars, alleged to be due to the said D. D., from the said G. G., by his promissory note to the said D. D. payable on the — day of —, in the year of our Lord —; (\*) and whereas, the said G. G. desires to retain in [or "*to have returned to*"] his possession, the said mule and cart, and the harness pertaining to the same, and to keep the same at his risk, and has tendered the above-bound S. S. as his surety in such a bond as the law requires for that purpose. Now, therefore, if the said G. G. shall have the said mule and cart, and the harness pertaining thereto as aforesaid, so levied on as aforesaid, forthcoming at such time and place as the said court [or "*justice*"] may require, then the above obligation to be void, otherwise to remain in full force.

D. D. [SEAL.]

S. S. [SEAL.]

#### 76. *Forthcoming or Delivery Bond by Garnishee on Attachment, after his Liability is Ascertained.*

[V. C. 1873, c. 148, § 17, 19; Dan. Attachments, 249.]

[*Pursue Form 75; supra, to (\*)*, and then proceed thus]: and whereas the above-bound G. G. has been summoned as a garnishee in the attachment aforesaid, and has acknowledged himself to be indebted to the said D. D. in the said sum of — dollars, due to the said D. D. from the said G. G. by his promissory note, with interest thereon as aforesaid, and also to be in possession of the said mule and cart, with the harness pertaining thereto, which he admits to be the property of the said D. D., and whereas it has been ordered by the said court [or "*justice*"] that the said G. G. may give bond, with sufficient security, in the penalty of — dollars, the sum in the above obligation named [*the penalty is prescribed by the court*] payable to the said L. L., [*it may be to any person prescribed by the court,*] with condition to pay the amount due by the said G. G., as aforesaid, and to have the effects aforesaid forthcoming at such time and place as the said court may there-

after require; and whereas the said G. G. has tendered the said S. S. as his surety in such a bond as the law requires. Now, therefore, if the said G. G. shall pay to the said L. L. the said sum of — dollars, with lawful interest thereon, from the — day of —, in the year of our Lord, 18—, until paid, and shall also have the said mule and cart, with the harness pertaining thereto, as aforesaid, forthcoming at such time and place as the said court [or “justice”] may hereafter require, then the above obligation to be void, otherwise to remain in full force.

G. G. [SEAL.]

S. S. [SEAL.]

77. *Affidavit to obtain an Attachment in an action of Debt on a Note.*

(V. C. 1873, c. 148, § 2; *Ante*, p. 541 & seq.)

Virginia,

County [or “Corporation”] of —, to-wit:

This day O. C. made oath before me, a justice of the peace in and for the county [or “corporation”] aforesaid, [or before me, B. T., clerk of the court of the said county [or “corporation”] of —, [that in an action of debt now pending [or “about to be instituted”] wherein he is [or “is to be”] plaintiff, upon a note in writing against D. D., in the circuit [or “corporation”] court of the county [or “corporation”] of —, the amount of his claim in the said suit, is — dollars of principal money, with legal interest thereon from the — day of —, in the year of our Lord, 18—, until paid; that the said claim he believes to be just, and justly due to him; and that he believes that the said D. D. is removing [or “intends to remove”] his estate, or the proceeds of the sale of his property, or a material part of such estate or proceeds, out of this State, so that process of execution on a judgment in said suit will be unavailing.

Given under my hand, this — day of —, in the year of our Lord 18—.

R. W., J. P.

78. *Attachment issued by the Clerk in an Action of Debt on a Note.*

(V. C. 1873, c. 148, § 2, 6; *Ante*, p. 541; *Mayo's Guide*, 174.)

The Commonwealth of Virginia:

To the Sheriff of the County [or “Sergeant of the Corporation”] of —,  
Greeting:

Whereas, O. C., the plaintiff in an action of debt, upon a note in writing, now pending [or “about to be instituted”] against D. D. in the circuit [or “corporation”] court of the county [or “corporation”] of —, has this day made oath before me, B. T., clerk, [or “R. B. P., deputy clerk”] of the said court, [or “before R. W., a justice of the peace in and for the county [or “corporation”] of —, as duly appears by the certificate of the said R. W.”] that the amount of the said affiant's claim in the said suit is — dollars of principal money, with legal interest thereon from the — day of —, in the year of our Lord, 18—, until paid; that he believes that the said claim is just and justly due to him, and that he believes that the said D. D. is removing [or “intends to remove”] his estate, or the proceeds of the sale of his property, or a material part of such estate or proceeds, out of this State, so that process of execution on a judgment in said suit will be unavailing; we do therefore command you to attach so much of the estate of the said D. D. as will be sufficient to satisfy the said sum of — dollars of principal, with legal in-



terest thereon as aforesaid, and so to provide that the said estate so attached may be forthcoming, and liable to further proceedings therein, to be had before the said court, at the next term thereof. And that you have this writ at the clerk's office of the said circuit [or "*corporation*"] court, at the rules to be holden for the said court, on the first Monday in — next, [*the return-day of the writ instituting the suit;*] and that you then and there make known how you have executed the same.  
 Witness, B. T., the clerk of our said court, at the court-house of the said county [or "*corporation*,"] on the — day of —, in the year of our Lord —, and in the — year of our foundation.

Teste:

B. T., Clerk.

The form of the affidavit and attachment will vary somewhat in the description of the several sorts of action; but by reference to the statute (V. C. 1878, c. 148, § 2,) and to the text (*Ante*, p. 541 & seq, 527 & seq,) it will not be difficult to adapt these Forms to the other cases. Copious forms, however, will be found in Mayo's Guide, 101 & seq, and also in Dan. Attachments, 241 & seq.

It will be recollected, that the statute allows the attachment to be addressed to the sheriff or any constable of a county, or to the sergeant or any constable of a corporation. (V. C. 1878, c. 148, § 6.)

*78a. Bond by Plaintiff on Attachment for Debt, &c., in Pending Suit, to pay Costs and Damages.*

(V. C. 1878, c. 148, § 2, 8; Id. c. 12 § 6: *Ante*, p. 336, 542; Mayo's Guide, 106.)

Know all men by these presents, that we, C. C. and S. S., are held and firmly bound unto the Commonwealth of Virginia in the just and full sum of — dollars in gold, to be paid to the said Commonwealth, to which payment we bind ourselves and our heirs, jointly and severally. Sealed with our seals, and dated this — day of —, 18—.

The condition of the above obligation is such that, whereas the said C. C., plaintiff in a certain action of debt, [or "*trepasse on the case*," &c., as the case may be,] pending against one D. D. in the — court, for the — of —, did, on the — day of —, 18—, upon his affidavit made in due form of law, obtain from the clerk's office of the said court an attachment against (\*) the estate of the said D. D., for the sum of — dollars, with lawful interest thereon from the — day of —, 18—, until paid, being the principal money and interest [or "*damages and interest*," or "*damages*,"] claimed by the said C. C. in the said suit, which said attachment is directed to the sheriff [or "*sergeant*"] or any constable of the — of —, and is returnable before the said — court, at the next term thereof [or "*at rules to be holden therefor, in the clerk's office thereof, on the first Monday in — next*"]: Now, therefore, if the said C. C. shall pay all costs and damages which may be awarded against him, or sustained by any person by reason of his suing out the said attachment, then the above obligation is to be void, otherwise to remain in full force and virtue.

C. C. [SEAL.]

S. S. [SEAL.]

If the suit be for specific property, as in an action of detinue, pursue the foregoing Form to (\*), and then say: "the specific property sought to be recovered in the action aforesaid, consisting of —, and also against the estate of the said D. D. for the probable damages recoverable for the detention of the said property, amounting to — dollars, which said attachment is directed," &c., as in the foregoing Form.

79. *Replevy Bond by Claimant, or Defendant.*

(V. C. 1873, c. 148, § 13, 14; *Ante*, p. 543; Mayo's Guide, 108.) See Form 73, *Supra*.

80. *Delivery or Forthcoming Bond by Claimant or Defendant.*

(V. C. 1873, c. 148, § 13, 14; Mayo's Guide, 101; *Ante*, 543.) See Form 74, *Supra*.

81. *Forthcoming or Delivery Bond, by Garnishee on Attachment, when levy is Made.*

(V. C. 1873, c. 148, § 17; Mayo's Guide, 101.) See Form 74, *Supra*.

82. *Forthcoming or Delivery Bond, by Garnishee on Attachment after his Liability is ascertained.*

(V. C. 1873, c. 148, § 17; Dan. Attachm'ts, 240.) See Form 76, *Supra*.

83. *Affidavit for Attachment by Clerk, in an Action at Law, against a Non-resident Debtor for Debt, or Damages for Breach of Contract.*

(V. C. 1873, c. 148, § 1; *Ante*, p. 385 & seq.)

Virginia,

County [or "Corporation"] of ———, to-wit:

This day O. C. appeared in person before me, a justice of the peace, in and for the county [or "corporation"] aforesaid, [or "before me, the clerk of the circuit" [or "corporation"] court of the said county [or "corporation"],] and made oath that he has a just claim against D. D. for the sum of ——— dollars, for debt [or "for damages for breach of contract"] with lawful interest thereon, from the ——— day of ———, in the year of our Lord, 18—, until paid, and that he has present cause of action therefor; that the said D. D. is not a resident of this State, and that the affiant believes that he has estate and debts due him within the said county [or "corporation"] of ———, [or if he has effects within the State, but not within the county or corporation where the suit is instituted, but is sued "along with a resident therein," say, "Within the county [or "corporation"] of W. or elsewhere in Virginia, and that he is sued jointly with one S. S., who resides in the said county [or "corporation"] of ———."] Given under my hand this ——— day of ———, in the year of our Lord, ———.

B. W., J. P., or

B. T. Clerk.

84. *Attachment by Clerk in an Action at Law against a Non-resident for Debt, or Damages for Breach of Contract.*

(V. C. 1873, c. 148, § 1; *Ante*, p. 385, &c.; Dan. Attachm't, 241; Mayo's Guide, 102.)

The Commonwealth of Virginia,

To the Sheriff of the County [or "Sergeant of the Corporation"] of ———, Greeting:

Whereas, O. C. has instituted in our circuit [or "corporation"] court for the county [or "corporation"] of ———, an action of debt [or "of covenant," or "of trespass on the case in assumpsit," it cannot be an action *ex delicto*], which is now pending in our said court against D. D., and the said O. C., having made oath

before B. W., a justice of the peace of the county [or "*corporation*"] of ——— [or "*before B. T., the clerk of the said court,*" ] that the claim asserted in the said action is just, for the sum of ——— dollars for debt, [or "for damages for breach of contract"] with lawful interest thereon from the ——— day of ———, in the year of our Lord, ———, until paid, and that he has present cause of action therefor, that the said D. D. is not a resident of this State; and that the affiant believes that the said D. D. has estate and debts due him in the said county [or "*corporation*"] of ———: Therefore, we command you that you attach the estate of the said D. D. for the amount aforesaid of principal and interest, and that you receive such estate so attached into your hands, and so provide that the same may be forthcoming and liable to farther proceedings to be had thereon, according to law. And that you have this writ at the clerk's office of our said circuit [or "*corporation*"] court for the said county [or "*corporation*"] of ———, at the rules to be holden for our said court, on the ——— Monday in ——— next, [or if the writ be returnable, as it may be, to "a term of the court," say, "at the next term of our said circuit, [or "at the next term for the trial of jury causes of our said corporation"] court for the county [or "*corporation*"] of ———], and then and there make return how you have executed this writ. Witness B. T., clerk of our said circuit [or "*corporation*"] court, this ——— day of ———, in the year of our Lord, ———, and of our foundation the ———.

Teste,

B. T., Clerk.

☞ The forms of affidavit and attachment, when the amount does not exceed \$20, exclusive of interest, (in which case the proceeding is before a justice of the peace, V. C. 1873, c. 148, § 29), may be easily adapted from the foregoing. (Mayo's Guide, 97; Dan. on Attachm'ts, 239.)

85. *Affidavit for Attachment by a Justice of the Peace, where the Debtor intends to remove, is removing, or has removed his Effects out of the State, whether the claim be payable or not.*

(V. C. 1873, c. 148, § 3, 29; *Ante*, p. 337; Mayo's Guide, 99; Dan. Attachm'ts. 236-7.)

Virginia,

County [or "*Corporation*"] of ———, to-wit:

This day O. C. appeared in person before me, a justice of the peace in and for the county [or "*corporation*"] aforesaid, and made oath that D. D. is justly indebted to him in the sum of ——— dollars, and that the said sum became [or "*will become*"] payable on the ——— day of ———, in the year of our Lord, ———, and that to the best of the said affiant's belief, the said D. D., intends to remove, [or "*is removing,*" or "*has removed*"] his effects out of this State, so that there will probably not be therein sufficient effects of the said D. D., to satisfy the aforesaid claim of the said affiant, when judgment is obtained therefor, should only the ordinary process of law be used to obtain such judgment. Given under my hand this ——— day of ———, in the year of our Lord, ———.

R. W., J. P.

86. *Bond by Plaintiff in Attachment against a Debtor who intends to remove, is removing, or has removed his Effects.*

(V. C. 1873, c. 148, § 3, 8; Id. c. 12, § 6; *Ante*, p. 337; Mayo's Guide, 107.)

Know all men by these presents, &c., [as in Form 78.]

The condition of the above obligation is such that whereas, O. C., a member of the partnership composed of O. C., W. W. and P. P., doing business under the

partnership name and style of O. C. and company, did, on the — day of —, 18—, upon his complaint on oath, made in due form of law, before R. W., a justice of the peace, in and for the county of —, in the State of Virginia, obtain from the said R. W. an attachment, in the name of the said O. C. and company, against the estate of one D. D., for the sum of — dollars, with legal interest thereon, from the — day of —, 18—, until paid, which said attachment is directed to the sheriff or any constable of the said county of —, and is made returnable at — in the said county, on the — day of —, 18—, before the said R. W., or some other justice of the said county; [or, if the amount exceed \$20, say "is made returnable before the county [or "circuit"] court of the said county, on the first day of the next term."] Now, therefore, if the said O. C. shall pay all costs and damages which may be awarded against him, or sustained by any person, by reason of his suing out the said attachment, then the above obligation to be void, otherwise to remain in full force and virtue.

C. C. [SEAL.]

S. S. [SEAL.]

87. *Attachment by a Justice of the Peace, where a Claim (whether Payable or not,) exceeds \$20, exclusive of Interest, and Debtor intends to remove, is removing, or has removed his Effects out of the State.*

V. C. 1873, c. 148, § 3; *Ante*, p. 337; Mayo's Guide, 99; *Dan. Attachm't*, 236-7.

Virginia:

County [or "Corporation"] of —, to-wit:

Whereas O. C. has this day made oath before me, R. W., a justice of the peace of the said county, [or "corporation"] that D. D. is justly indebted to him in the sum of — dollars, and that the said sum became [or "will become"] payable on the — day of —, in the year of our Lord, —, and that the said affiant believes that the said D. D. intends to remove [or "is removing," or "has removed"] his effects out of this State, so that there will probably not be therein sufficient effects of the said D. D. to satisfy the claim aforesaid of the said affiant when judgment is obtained therefor, should only the ordinary process of law be used to obtain such judgment. These are, therefore, in the name of the commonwealth, to require you to attach the estate of the said D. D. for the amount of the said claim of the said O. C., and such estate so attached in your hands to secure, so that the same shall be forthcoming and liable to further proceedings thereupon, to be had before the circuit [or "county"] court of the said county [or "the circuit" or "corporation court of the said corporation"] of —, on the first day of the next term thereof. And that you have then and there this warrant, and make return to the said court how you have executed the same. Given under my hand this — day of —, in the year of our Lord, —.

R. W., J. P.

☞ The forms of an affidavit and attachment, where the amount does not exceed \$20, exclusive of interest, (V. C. 1873, c. 148, § 29,) may easily be adapted from these last given.

See Mayo's Guide, 99, 97.

88. *Suspending Bond in Case of Interpleader.*V. C. 1873, c. 149, § 6, 2; Id. c. 179, § 8; *Ante*, p. 350, 353.

Know all men by these presents, that we, P. P. and S. S., are held and firmly bound unto L. M., sheriff of the county [or "*sergeant of the corporation*"] of —, in the sum of — dollars, [*equal to double the value of the property,*] in gold, to be paid to the said L. M., for the payment whereof we bind ourselves and our heirs, jointly and severally. Sealed with our seals, and dated this — day of —, in the year of our Lord, —.

The condition of the above obligation is such that, whereas one C. C., upon a judgment recovered by him in the circuit [or "*corporation*"] court, for the county [or "*corporation*"] of —, against one D. D., has sued out a writ of *fiery facias* against the goods and chattels of the said D. D., to satisfy the said C. C., of the sum of — dollars, with interest thereon after the rate of six per centum per annum, from the — day of —, in the year of our Lord, —, until paid; and — dollars costs, which writ is directed to the sheriff of the said county [or "*sergeant of the said corporation*"] of —, and J. B. deputy for L. M., the sheriff [or "*sergeant*"] aforesaid has levied the same on — [*describe the chattels levied on*]; and whereas the above-bound P. P. claims the said chattels so levied upon as his property, and desires that the sale thereof shall be suspended until the claim thereto can be adjusted; Now, if the said P. P. shall pay to any person or persons who may be injured by such suspension until the claim to the said property can be adjusted, such damages as he or they may sustain by such suspension, then the above obligation to be void, otherwise to remain in full force.

P. P. [SEAL.]

S. S. [SEAL.]

89. *Application for Process of Interpleader by Claimant of Effects levied on.*(V. C. 1873, c. 149, § 2, 3; Id. c. 147, § 14; *Ante*, p. 350, 352.)

To the Honorable the judge of the circuit court of the county [or "*corporation*"] of —, or to —, esquire, judge of the county [or "*corporation*"] court of the county [or "*corporation*"] of —:

The application of your petitioner, P. P., respectfully shows, that on the — day of —, in the year of our Lord, —, an execution of *fiery facias* was issued from the clerk's office of the — court for the county [or "*corporation*"] of —, at the suit of C. C., against the goods and chattels of one D. D., for the sum of — dollars, with interest thereon after the rate of — per centum per annum, from the — day of —, in the year of our Lord, —, until paid, and — dollars costs, and that afterwards, to-wit: on the — day of —, in the year of our Lord, —, the said execution was by J. B., deputy for L. M., sheriff of the county [or "*sergeant of the corporation*"] of —, levied upon certain goods and chattels, as and for the goods and chattels of the said D. D., to-wit: [*Describe the articles with their values severally*], and the said petitioner in fact says that the said goods and chattels, at the time of the issuing of the said writ of *fiery facias*, and long before, were, and ever since have been, the property of the said petitioner, and not the property of the said D. D., and that the said D. D. had not then, nor at any time since has had, any right or interest therein, or in any part thereof. Wherefore your petitioner, having duly

executed and delivered to the said J. B., deputy sheriff [or "*sergeant*"] as aforesaid, a suspending bond in the penalty, and on the condition required by law, he prays that as well the said C. O. as the said petitioner may be caused to appear before the ——— court of the county [or "*corporation*"] of ———, to state and litigate their respective claims, as touching the goods and chattels aforesaid, in order to a decision of their rights respectively touching the same, and your petitioner will ever pray, &c.

(Signed,)

P. P.

Virginia,

County [or "*Corporation*"] of ———, to-wit:

This day, P. P. appeared in person before me, R. W., a justice of the peace in and for the county [or "*corporation*"] and State aforesaid, and made oath that the matters and things stated in the foregoing petition are true. Given under my hand, this ——— day of ———, in the year of our Lord, ———.

R. W., J. P.

### 90. Order for Interpleader by Circuit Judge in Vacation.

(V. C. 1873, c. 149, § 2, 3; *Ante*, p. 353.)

Virginia,

County [or "*Corporation*"] of ———, to-wit:

Whereas, it appears that P. P., the petitioner named in the petition annexed, has delivered to the within-named J. B., deputy for L. M., sheriff of the county [or "*sergeant of the corporation*"] of ———, a suspending bond, with good security, in the penalty and on the condition required by law, it is hereby ordered in the name of the Commonwealth, that the sheriff of the said county [or "*sergeant of the said corporation*"] of ———, do summon as well the said C. O. as the said P. P. to appear before the ——— court of the said county [or "*corporation*"] of ———, on the ——— day of the next term thereof, to state and litigate their respective claims as touching the goods and chattels in the said petition, designated as levied on, in pursuance of the writ of *feri facias* therein named, in order to a decision of their rights respectively, as touching the same. Given under my hand, as judge of the circuit [or "*of the county or corporation*"] court, for the said county [or "*corporation*"] of ———, this ——— day of ———, in the year of our Lord, ———.

H. S., Judge.

### 91. Order for Process of Interpleader, by Court in term.

(V. C. 1873, c. 149, § 2, 3; *Ante*, p. 353.)

Upon motion of P. P., who appears to have delivered, according to law, to J. B., deputy for L. M., sheriff of the county [or "*sergeant of the corporation*"] of ———, a suspending bond, with good security, in the penalty and on the condition required by law, and who complains that an execution of *feri facias*, issued on the ——— day of ———, in the year of our Lord, ———, from the clerk's office of the ——— court of the county [or "*corporation*"] of ———, at the suit of C. O., against the goods and chattels of one D. D., for ——— dollars, with interest thereon, after the rate of ——— per centum per annum, from the ——— day of ———, in the year of our Lord, ———, until paid, and ——— dollars costs has been by the said J. B., deputy sheriff [or "*sergeant*"] as aforesaid, levied upon certain goods and chattels, to-wit: one sorrel horse, of the value of ——— dollars,

&c., [describing the articles levied on, and their values severally,] as and for the goods and chattels of the said D. D., which goods and chattels, as the said P. P. avers, at the time of the issuing of the said writ of *feri facias*, and long before, were, and ever since have been, and are now, the proper goods and chattels of him, the said P. P., and not the goods and chattels of the said D. D.; it is ordered that as well the said C. C. as the said P. P., be summoned to appear, here on the — day of the present term [or on the — day of the present [or the next] month,] to state and litigate their respective claims, as touching the goods and chattels aforesaid, in order to a decision of their rights severally touching the same.

92. *Delivery or Forthcoming Bond by Claimant, in order to Re-gain Possession of the Effects pending Suit.*

(V. C. 1873, c. 149, § 7; *Ante*, p. 354.)

Know all men by these presents, that we, P. P. and S. S., are held and are firmly bound unto C. C., in the sum of — dollars in gold, to be paid to the said C. C.; for the payment of which, we bind ourselves and our heirs jointly and severally. Sealed with our seals, and dated this — day of —, in the year of our Lord, —.

The condition of the above obligation is such that whereas the above-named C. C., upon a judgment obtained by him in the — court of the county [or "corporation"] of —, against one D. D., has sued out a writ of *feri facias*, for taking the goods and chattels of the said D. D., which writ is directed to the sheriff of the said county [or "sergeant of the said corporation;"] and whereas, by virtue thereof, the following goods and chattels, to-wit: [specify the chattels levied on]: have been taken by J. B., deputy for L. M., sheriff of the said county [or "sergeant of the said corporation"] of —, as and for the goods and chattels of the said D. D., to satisfy the said execution, the amount whereof at this time, including officers' fees and commissions, is — dollars; and whereas the said goods and chattels so levied on as aforesaid, are claimed by the above-bound P. P., as and for his proper goods and chattels, and not the goods and chattels of the said D. D., and the said P. P. desires that they should remain in his possession, in whose possession the same were immediately before the said levy, and at his risk, until such day of sale as may be hereafter lawfully appointed, and has tendered the above-bound S. S. as his surety, in such a bond as the law requires for that purpose. Now, therefore, if the said P. P. shall have the property so levied on as aforesaid forthcoming at such day and place of sale as may be hereafter lawfully appointed, then the above obligation to be void, otherwise to remain in full force.

P. P. [SEAL.]

S. S. [SEAL.]

93. *Summons in a Personal Action.*

(V. C. 1873, c. 166, § 5; *Ante*, p. 521; Sands' Forms, 289.)

The Commonwealth of Virginia:

To the Sheriff [or "Sergeant"] of the — of —, Greeting:

We command you, that you summon D. D., if he be found in your bailiwick, to appear before the judge of our — court for our said —, at the next term, [or "at the clerk's office of our — court for our said —, at the rules to be holden

for the said court, on the — Monday in — next,"] to answer C. C. of a plea of [here describe the plea as in Note (\*) below]. And have then there this writ.

Witness, B. T., clerk of our said — court, at the court-house, this — day of —, in the year of our Lord, eighteen hundred and —, and of our foundation the —.

Teste:

B. T., Clerk.

#### 94. *Capias ad Respondendum.*

(V. C. 1873, c. 148, § 38; Id. c. 166, § 1; Rob. Forms, 1.)

The Commonwealth of Virginia:

To the Sheriff [or "*Sergeant*"] of the — of —, Greeting:

We command you, that you take D. D., if he be found within your bailiwick, and him safely keep, so that you have his body before the judge of our — court for our said —, at the court-house thereof, on the first day of the next term [or "at the clerk's office of our — court for our said —, at the rules to be holden for our said court, on the — Monday in — next,"] to answer C. C. of a plea of [here describe the action, as in Note (\*), below.] And have then there this writ. Witness, B. T., clerk of our said — court, at the court-house, this — day of —, in the year of our Lord, eighteen hundred and —, and of our foundation the —.

Teste:

B. T., Clerk.

#### COMMENCEMENTS AND CONCLUSIONS OF DECLARATIONS.

**Note.** In all the forms of pleadings which follow, the court is supposed to be the Circuit court of a county. The student will not fail to understand that the actual title of the court must always be conformed to. (*Ante*, p. 568.)

#### 95. *Commencements of Declarations.*

*In Assumpsit.* Circuit court for A county, to wit:

— Rules, 18—.

C. C. complains of D. D. of a plea of trespass on the case in assumpsit; For this, to wit, &c.: [here set forth the cause of action]

(\*) **NOTE.**—The several actions are described in the writ as follows:

*Debt.*—"Plea of debt for \$—, Damages \$—."

*Covenant.*—"Plea of covenant broken, Damages \$—."

*Trespass on the Case in Assumpsit.*—"Plea of trespass on the case in assumpsit, Damages \$—."

*Account.*—"Plea of Account-render, Damages \$—."

*Detinue.*—"Plea of Detinue for sundry goods and chattels, to wit: — of the value of — dollars, (discriminating the value of each several chattel as far as may be,) Damages \$—."

*Trespass Generally.*—"Plea of Trespass, Damages \$—."

*Trespass for Assault, &c., (T., A., and B.)*—"Plea of Trespass, Assault, and Battery, Damages \$—."

*T., A., and B., and False Imprisonment.*—"Plea of Trespass, Assault and Battery, and False Imprisonment, Damages \$—."

*Tr. Qu. cl. fr.*—"Plea of Trespass *quare clausum fregit*, Damages \$—."

*Forcible Entry, &c.*—"To answer the complaint of C. C., that the said D. D. is in possession of, and unlawfully withholds from the said C. C., certain premises, lying and being in the county," &c. [describing them]. See V. C. 1873, c. 130, § 1; *Ante*, p. 518.



*in assumptit, and conclude as post p. 1363].* It is best to describe the plaintiff and defendant after once naming them, by the terms, "the said plaintiff,"—"the said defendant," without repeating their names. (1 Chit. Pl. 286; 2 do. 12.)

*In Account.*

Circuit court for A county, to wit :

— Rules, 18—.

O. C. complains of D. D. that he render to the said plaintiff a reasonable account for the time he was receiver of the moneys of the said plaintiff; for this, to wit, &c. :

See 1 Chit. Pl. 13; 3 do. 1297; 1 Wentw. Pl. 81 & seq.

*In Debt.*

Circuit court for A county, to wit :

— Rules, 18—.

O. C. complains of D. D. of a plea that he render to the said plaintiff the sum of — dollars, which to him the said defendant owes, and from him unjustly detains; for this, to wit, &c.

See 2 Chit. Pl. 18; *Ante*, p. 590.

*In Debt  
qui tam*

Circuit court for A county.

— Rules, 18—.

O. C., who sues as well for the commonwealth of Virginia as for himself in this behalf, complains of D. D. of a plea that he render to the said commonwealth, and to the said plaintiff, who sues as aforesaid, the sum of — dollars, which to them the said defendant owes, and from them unjustly detains; for this, to wit, &c.

See 2 Chit. Pl. 18.

*In Covenant.*

Circuit court for A county, to wit :

— Rules, 18—.

O. C. complains of D. D. of a breach of covenant; for this, to wit, &c.

See 2 Chit. Pl. 13, 577, &c.

*In Detinue.*

Circuit court for A county, to wit :

— Rules 18—.

O. C. complains of D. D. of a plea that he render unto the said plaintiff certain goods and chattels, to wit: [*Describe them*] of the value of — dollars, which he unjustly detains from him: For this, to wit, &c.

See 2 Chit. Pl. 14, 593.

*In Trespass on  
the Case in Tro-  
ver, Slander,  
&c.*

Circuit court for A county, to wit :

— Rules 18 — .

O. C. complains of D. D. of a plea of trespass on the case: For this, to wit, &c.

See 2 Chit. Pl. 14.

*In Trespass.*

Circuit court for A county, to wit :

— Rules, 18—.

O. C. complains of D. D. of a plea of trespass: For this, to wit, that, &c.

See 2 Chit. Pl. 14.

96. *Conclusions of Declarations.*

(1 Chit. Pl. 286 ; 2 do. 12.)

*Ordinary conclusion.* To the damage of the said plaintiff of \$—, and therefore he brings his *suite*.

(Signed,)

W., p. q.

*In Debt Quis tam.* And therefore, as well for the Commonwealth as for himself in this behalf, he brings this *suite*.

(Signed)

Y., p. q.

*In Trespass.* And other wrongs to the said plaintiff, the said defendant then and there dig, against the peace of the Commonwealth, and to the damage of the said plaintiff of \$—, and therefore he brings this *suite*.

(Signed,)

N. S. W., p. q.

## PARTICULAR FORMS OF EXPRESSION.

97. *Description of an Infant suing by his Prochein Ami.*

C. C. by E. G., who is admitted by the court here to prosecute for the said C. C., (who is an infant within the age of twenty-one years,) as the next friend of the said C. C., complains of D. D., &c.

See 2 Chit. Pl. 32 ; *Ante*, p. 569.

☞ From the nature of the case, this is applicable to plaintiffs alone.

98. *Description of Partners in Trade.*

C. O., G. M. and H. R., partners in trade under the style and firm of C. O. & Co., (or *whatever is the firm name*,) complain of D. D., &c.

See *Ante*, p. 569.99. *Description of an Executor.*

C. O., executor of the last will and testament of Z. Y., deceased, complains, &c.

See 2 Chit. Pl. 34 ; *Ante*, p. 569.

☞ In debt, whether by or against an executor or administrator, omit the words in the *queritur*, "*owes to and*" and employ only the word "*detains*."

See 2 Chit. Pl. 34, 13 ; *Ante*, p. 569, 571, 591.100. *Description of an Administrator.*

C. O., administrator of all and singular the goods and chattels, rights and credits, which were of Z. Y., deceased, at the time of his death, who died intestate.

See 2 Chit. Pl. 34 ; *Ante*, p. 569.101. *Description of an Administrator with Will annexed.*

C. O., administrator, (with the will of Z. Y., deceased, annexed,) of all and singular the goods and chattels, rights and credits, which were of the said Z. Y., deceased, at the time of his death.

See 2 Chit. Pl. 35 ; *Ante*, p. 569.

102. *Description of an Administrator de bonis non.*

C. C., administrator of all and singular the goods and chattels, rights and credits, which were of Z. Y., deceased, at the time of his death, who died intestate, left unadministered by G. H., now deceased, which said G. H., in his life-time, and at his death, was the administrator of all and singular the goods and chattels, rights and credits, which were of the said Z. Y., deceased, at the time of his death.

See 2 Chit. Pl. 35; *Ante*, p. 569.

103. *Description of an Administrator de bonis non with Will annexed.*

C. C., administrator, (with the last will and testament of Z. Y., deceased, annexed,) of all and singular the goods and chattels, rights and credits, which were of the said Z. Y., deceased, at the time of his death, left unadministered by W. F. and G. L., in their life-time, now respectively deceased, and which said W. F. and G. L., in their life-time and at their deaths, were the executors of the said Z. Y., deceased.

See 2 Chit. Pl. 35; *Ante*, p. 569.

104. *Profert of Letters of Probate of a will.*

Coming in the declaration after the "*production of suite*." "And the said plaintiff brings into court here, the letters testamentary of the said Z. Y., deceased, whereby it fully appears to the said court here, that the said plaintiff is executor of the last will and testament of the said Z. Y., deceased, and hath the execution thereof.

See 2 Chit. Pl. 35; 5 Rob. Pr. 55-'6; *Ante*, p. 589.

In Virginia, it is provided by statute, "A copy of the order whereby certificate is granted to any personal representative for obtaining probate or letters of administration, shall be as effectual as the probate or letters made out in due form; nevertheless they may be made out in due form if required, and are then to be signed by the clerk, sealed with the seal of the court, and attested by the presiding judge thereof." (V. C. 1873, c. 126, § 11.) Hence, the averment of *profert* is with us satisfied by the production of the certificate. (*Dickinson v. McCraw*, 4 Rand. 158.)

It is now enacted in Virginia, that it shall not be necessary in any action to make *profert* of any deed, letters testamentary, or commission of administration. (V. C. 1873, c. 167, § 9.)

105. *Profert of Letters of Administration.*

Coming in a declaration after the "*production of suite*:"—

And the said plaintiff brings into court here the letters of administration of the said — court of the said county [or "*corporation*"] of —, which give sufficient evidence to the court here of the grant of administration to the said plaintiff as aforesaid, the date thereof is the day and year therein mentioned, to-wit, the day and year in that behalf above mentioned, &c.

See *Ante*, p. 589; 2 Chit. Pl. 36; 5 Rob. Pr. 55-'6, and the other statutes mentioned under the proceeding form, viz: V. C. 1873, c. 126, § 11; *Id.* c. 167, § 9. See also *Dickinson v. McCraw*, 4 Rand. 158.

106. *Profert by an Administrator de bonis non.*

Coming in the declaration after "*production of suite*:"—

And the said plaintiff brings into court here the letters of administration of the said — court of the said county [or "*corporation*"] of —, which give sufficient evidence to the said court here of the grant of administration to the said G. H., as aforesaid, as also the letters of administration of the same court, after the death of the said G. H., to the said plaintiff as aforesaid, the respective dates whereof are the days and years aforesaid in that behalf above mentioned.

See 2 Chit. Pl. 36; 5 Rob. Pr. 55-'6; V. O. 1873, c. 726, § 11; Id. c. 167, § 9; Dickinson v. McCraw, 4 Rand. 158.

It seems that it is not needful at common law to produce the first letters. (1 B. & Cr. (8 E. O. L.) 150.)

107. *Profert by an Administrator with the Will Annexed, coming in the Declaration after the "Production of Suite."*

And the said plaintiff brings into court here the letters testamentary of the said Z. Y., deceased, whereby it appears that the last will and testament of the said Z. Y., deceased was, by the — court of the county [or "*corporation*"] of — in due form of law admitted to probate; and the said plaintiff also brings here into court the letters of administration (no executor of the last will and testament of the said Z. Y., deceased, having qualified according to law for the execution of the same,) of the said — court of the said county [or "*corporation*"] of —, to the said plaintiff as aforesaid, which give sufficient evidence to the court here of the said grant of administration to the said plaintiff as aforesaid, the date of which said letters of administration is a day and year therein named, to wit, the day and year in that behalf above mentioned, &c.

See 2 Chit. Pl. 36; 5 Rob. Pr. 55-'6; V. O. 1873, c. 126, § 11; Id. c. 167, § 9; Dickinson v. McCraw, 4 Rand. 158; 1 B. & Cr. (8 E. O. L.) 150.

108. *Statement of Breach in Declaration by an Administrator.*

*To come after all the Counts.*

Yet the said defendant, not regarding his said promises and undertakings, [*supposing the action to be trespass on the case in assumpsit. If it be debt, covenant, &c., the phraseology must be adapted to those actions respectively.* See 2 Chit. Pl. 466-'7.] But contriving and intending to deceive and defraud in this behalf the said Z. Y. in his lifetime, and the said plaintiff, as administrator as aforesaid, after the death of the said Z. Y. (to which said plaintiff, after the death of the said Z. Y., to wit: on the — day of —, in the year of our Lord eighteen hundred and seventy —, at the county of — aforesaid, administration of all and singular the goods, chattels, and credits which were of the said Z. Y., deceased, who died intestate, by the — court of the county [or "*corporation*"] of —; in due form of law was granted,) hath not as yet paid the said several sums of money, or any part thereof, to the said Z. Y. in his lifetime, or to the said plaintiff, since the death of the said Z. Y. (although often requested so to do); but he so to do hath hitherto wholly refused, and still refuses to pay the same, or any part thereof, to the said plaintiff, to the damage of the said plaintiff, as administrator as aforesaid, of \$——. And therefore he brings his *suite*; And the said plaintiff brings into court, &c. [*as in case of profert above.*]

See 2 Chit. Pl. 35-'6, 110.

109. *Statement in Declaration of Breach by an Administrator de bonis non, with Will Annexed.*

*To come after all the Counts.*

Yet the said defendant, not regarding his said several promises and undertakings [supposing the action to be *assumpsit*. If it be debt, covenant, &c., the phraseology must be adapted to those actions respectively. See 2 Ohit. Pl. 466-'77.] But contriving and intending to deceive and defraud, in this behalf, the said Z. Y., in his lifetime, now deceased, and the said G. H., in his lifetime, now also deceased, and which said G. H., in his lifetime, and at the time of his death, was executor of the last will and testament of the said Z. Y., deceased, and the said plaintiff, after the death of the said G. H., (to which said plaintiff, after the respective deaths of the said Z. Y. and G. H., to wit: on the — day of —, in the year of our Lord, eighteen hundred and —, administration of all and singular the goods and chattels, rights and credits, which were of the said Z. Y., deceased, at the time of his death, left unadministered by the said G. H., deceased, executor as aforesaid, with the will of the said Z. Y. annexed, by the — court of the county [or "*corporation*"] of —, in due form of law was granted,) hath not as yet paid to them, or any or either of them, the said several sums of money, or any or either of them, or any part thereof, (although often requested so to do.) But the said defendant so to do hath hitherto wholly failed and refused, and still fails and refuses to pay the same, or any part thereof, to the said plaintiff, administrator as aforesaid, to the damage of the said plaintiff, as administrator as aforesaid, \$—. And therefore he brings his *suite*. And the said plaintiff brings into court here the letters of administration, &c. [as in the foregoing cases of *profert*].

See 2 Ohit. Pl. 111; *Ante*, p. 589.

FORMS OF DECLARATIONS.

110. *Declaration in Debt on a Bond.*

(*Ante*, p. 566 & seq. 590 & seq.)

*Title of Court,  
and Rules.*

Circuit court for A county, to wit:

— Rules, 18—.

*Queritur.*

Charles Creditor complains of Daniel Debtor, of a plea that he render unto him the sum of — dollars, which to him he owes, and from him unjustly detains; for this to wit: that heretofore, to-wit, on the — day of —, in the year of our Lord eighteen hundred and —, at the said county of A, the said defendant, by his certain writing obligatory, sealed with his seal, and now to the court here shown, the date whereof is the day and year aforesaid, acknowledged himself to be held and firmly bound unto the said plaintiff, in the sum of — dollars, above demanded, to be paid to the said plaintiff, whenever the said defendant should be thereunto afterwards requested. [According to the terms of the bond.]

*Statement  
of Cause  
of Action.*

*Breach.*

Yet the said defendant, although often requested, hath not as yet paid to the said plaintiff the said sum of — dollars above-demanded, nor any part thereof, but the same to pay hath hitherto wholly failed and refused, and still doth fail and refuse, to the damage of the said plaintiff — dollars. And, therefore, he brings his *suite*.

G. R. C. A., p. q.

111. *Declaration in Debt on Promissory Note.*

(Ante, p. 566 &amp; seq, 590 &amp; seq.)

**Title of Court, and Rules.** Circuit court for A county, to-wit: — Rules, 18.—

**Queritur.** O. C. complains of D. D., of a plea that he render unto the said plaintiff the sum of ——— dollars, which to him the said defendant owes, and from him unjustly detains; for this to wit: that heretofore, to wit on the ——— day of ———, in the year of our Lord eighteen hundred and ———, the said defendant made and signed, and then delivered to the said plaintiff, his certain note in writing, commonly called a promissory note, and thereby promised and agreed to pay to the said plaintiff the said sum of ——— dollars, on or before the ——— day of ———, in the year of our Lord eighteen hundred and ———. [*According to the terms of the note.*]

**Breach.** Yet the said defendant, although often requested, hath not as yet paid to the said plaintiff the said sum of ——— dollars, above demanded, or any part thereof, but the same to pay hath hitherto wholly refused, and still doth refuse, to the damage of the said plaintiff of \$———. And, therefore, he brings his *suite*.

**Conclusion.** L. D. A., p. q.

112. *Declaration in Debt on open Account.*

**Title of Court, and Rules, Queritur.** Circuit court for A county, to-wit: — Rules, 18.—

**Statement of Cause of Action.** O. C. complains of D. D. of a plea that he render unto the said plaintiff the sum of ——— dollars, which to him the said defendant owes, and from him unjustly detains; for this, to wit: that heretofore, to wit, on the ——— day of ———, in the year of our Lord eighteen hundred and ———, the said defendant was indebted to the said plaintiff in the sum of ——— dollars for divers goods, wares and merchandise, before that time sold and delivered by the said plaintiff to the said defendant, and at his special instance and request, to be paid by the said defendant to the said plaintiff whenever the said defendant should be thereunto afterwards requested; whereby and by reason of the said sum of money being and remaining wholly unpaid, an action hath accrued to the said plaintiff, to have of and from the said defendant the said sum of ——— dollars above demanded.

**Breach.** Yet the said defendant, although often requested, hath not as yet paid to the said plaintiff the said sum of ——— dollars above demanded, or any part thereof, but the same to pay hath hitherto wholly refused, and still doth refuse; to the damage of the said plaintiff of \$———; and therefore he brings his *suite*.

**Conclusion.** C. O. B., p. q.

☞ The same count may embrace several subjects of indebtedness, *e. g.*, besides goods sold as in the above instance, work done, money lent, money paid, and money had and received, very much as in assumpsit. *Ante*, p. 762 & seq.; *post*, p. 2 Ohit. Pl. 385 to 387; *Id.* 39 & seq. There may be also a count of account stated, which may be as follows, deeming it an additional count:

*Count of Account Stated in Debt.*

*Count of Account Stated.* And for this also, that the said defendant afterwards, to wit, on the — day of —, in the year of our Lord eighteen hundred and —, accounted with the said plaintiff of and concerning divers other sums of money, before that time and then due and owing, and in arrear and unpaid, from the said defendant to the said plaintiff, and upon that accounting, the said defendant was then found to be in arrear, and indebted to the said plaintiff in the further sum of — dollars, to be paid by the said defendant to the said plaintiff, when the said defendant should be thereunto afterwards requested; whereby, and by reason of the said last mentioned sum of money being and remaining wholly unpaid, an action hath accrued to the said plaintiff, to demand and have of and from the said defendant the said last mentioned sum of — dollars, the residue of the said sum of — dollars, first above demanded.

Yet the said defendant [*stating the breach applicable to all the counts.*]

See 2 Chit. Pl. 387.

It should have been observed, in connection with form 112, that it is founded on the Virginia statute, (V. C. 1873, c. 141, § 10,) which declares that "an action of debt may be maintained upon any note or writing by which there is a promise," &c., to pay money, if the same be signed by the party to be charged, or his agent. Our courts consider that provision as allowing the action to be brought on the note, as a *quasi* specialty, in contradistinction to its being on the contract, of which the note is the evidence, and that consequently in such action no valuable consideration need be averred or proved, although the defendant may disprove such consideration if he can. (Peasley v. Boatwright, 2 Leigh, 195; Hollingsworth v. Milton, 8 Leigh, 50; Cunningham v. Herndon, 2 Call. 530; Murdock & als v. Herndon's Ex'or, 4 H. & M., 200; Butcher v. Carlile, 12 Grat. 520; Dungan v. Henderlite, 21 Grat. 149; Beirne, &c. v. Dunlap, 8 Leigh, 514.)

The form at common law, of a declaration in debt on a promissory note, may be seen, 2 Chit. Pl. 388.

113. *Declaration in Debt on Bond twice Assigned.*

*Title of Court,* Circuit Court for A County, to wit:

*and Rules* — Rules, 18—.

*Queritur.*

*Statement of Cause of Action.*

*Making Bond and Profert of same.*

*1st Assignment.*

Charles Creditor complains of David Debtor, of a plea that he render unto the said plaintiff the sum of — dollars, which to him the said defendant owes and from him unjustly detains: For this, to wit, that heretofore, to wit, on the — day of —, in the year of our Lord eighteen hundred and —, the said defendant, by his certain writing obligatory, sealed with his seal, and to the court now here shown, the date whereof is the day and year aforesaid, acknowledged himself to be held and firmly bound unto one Cary Callfort, in the sum of — dollars above demanded, to be paid to the said Cary when the said defendant should be thereunto afterwards requested [*or whatever is the period of payment named in the bond*], which said writing obligatory, the same being then unpaid, was afterwards, to-wit, on the — day of —, in the year of our Lord eighteen hundred and —, by the said

**2nd Assign-  
ment.** Cary, by an endorsement thereon, bearing date the day and year last aforesaid, and signed by the said Cary, for valuable consideration, assigned to one William Waitfort; and afterwards, to wit, on the — day of —, in the year of our Lord eighteen hundred and —, being still unpaid, was by the said William, by an endorsement thereon, bearing date the day and year last aforesaid, signed by the said William, for valuable consideration, assigned to the said plaintiff; whereby an action hath accrued to the said plaintiff to have and demand of the said defendant the said sum of — dollars; whereof the said defendant afterwards, to wit, on the — day of —, in the year of our Lord eighteen hundred and —, had notice.

**Notice.**

**Breach.** Yet the said defendant, although often requested, did not pay the said sum of — dollars above demanded, or any part thereof, to the said Cary before his assignment aforesaid to the said William, and notice thereof to the said defendant, nor to the said William before his assignment aforesaid to the said plaintiff, and notice thereof to the said defendant, nor hath he paid the same or any part thereof to the said plaintiff at any time, but the same to pay hath hitherto wholly refused, and still doth refuse, to the damage of the said plaintiff of \$—; And therefore he brings his *suite*.

**Non-payment to Obligees.**

**Non-payment to 1st Assignee.**

**Non-payment to Pl't.**

**Conclusion.**

T. R. B., p. q.

See V. C. 1873, c. 141, § 17 &amp; seq.

114 *Declaration in Debt on Penal Bond.***Title to Court.** Circuit Court for A County, to wit:**Rules.** — Rules, 18—.**Queritur.****Statement of  
Cause of  
Action.****Default.****Liability for  
penalty.**

C. C. complains of D. D. of a plea that he render unto the said plaintiff the sum of — dollars [*the penalty of the bond*], which to him the said defendant owes, and from him unjustly detains: For this, to wit, that heretofore, to wit, on the — day of —, in the year of our Lord eighteen hundred and —, the said defendant, by his certain writing obligatory, sealed with his seal, and now to the court here shown, the date whereof is the day and year aforesaid, promised to pay to the said plaintiff — dollars [*the principal sum*] on or before the — day of —, in the year of our Lord eighteen hundred and — [or if payable on demand, say, "*Whenever he the said defendant should be thereunto afterward requested*"]; and for the true payment thereof bound himself in the penal sum of — dollars, above demanded. Yet the said defendant, afterwards, to wit, on the — day of —, in the year of our Lord eighteen hundred and —, [or, if payable on demand, say, "*on demand duly made in this behalf, to wit, on the — day of —, in the year of our Lord eighteen hundred and —*"] did not pay to the said plaintiff the said sum of — dollars [*the principal sum*], according to the tenor and effect, true intent and meaning of the said writing obligatory, but therein wholly failed and made default. Whereby the said writing became and was forfeited; and an action accrued to the said plaintiff to have of and from the said defendant the said sum of — dollars, above demanded [*the penalty*].



**Breach.**

Nevertheless the said defendant, although often requested, hath not as yet paid to the said plaintiff the said sum of — dollars, above demanded [*the penalty*], or any part thereof, but the same to pay hath hitherto wholly neglected and refused, and still doth neglect and refuse, to the damage of the said plaintiff of \$—; And therefore he brings his *suite*.

**Conclusion.**

J. E. B., p. q.

¶ The judgment is *for the penalty*, to be discharged by the payment of the principal sum, and the interest thereon. (V. C. 1878, c. 178, § 16.)

The jurisdiction of the court is determined, not as formerly—by the penalty—but by the *amount due*. (V. C. 1878, c. 179, § 2.)

115. *Declaration in Debt on Bond, Promissory Note, and open Account. In three Counts.*

**Title of Court  
and Rules.**

Circuit Court for A County, to wit:

— Rules, 18—.

**Queritur.**

C. O. complains of D. D. of a plea that he render unto the said plaintiff the sum of — dollars [*the aggregate of the sum demanded in the several counts*], which to him the said defendant owes, and from him unjustly detains: For this, to wit: that heretofore, to wit, on the — day of —, in the year of our Lord eighteen hundred and —, the said defendant, by his writing obligatory, sealed with his seal, and to the court now here shown, the date whereof is the day and year aforesaid, acknowledged himself to be held and firmly bound unto the said plaintiff in the sum of — dollars, parcel of the said sum of — dollars, first above demanded, to be paid to the said plaintiff when he, the said defendant, should be thereunto afterwards requested;—

**Statement of  
Cause of  
Action.**

**1st Count, on  
Bond.**

**2nd Count, on  
Promissory  
Note.**

And for this also: that heretofore, to wit, on the — day of —, in the year of our Lord eighteen hundred and —, the said defendant made and signed his certain note in writing, commonly called a promissory note, the date whereof is the day and year last aforesaid, and thereby agreed to pay to the said plaintiff the further sum of — dollars, another parcel of the said sum of — dollars, first above demanded, to be paid to the said plaintiff whenever the said defendant should be thereunto afterwards requested;—

**3rd Count, on  
Open Ac-  
count.**

And for this also: that heretofore, to wit, on the — day of —, in the year of our Lord eighteen hundred and —, the said defendant was indebted to the said plaintiff in the further sum of — dollars, for divers goods, wares and merchandise, before that time sold and delivered by the said plaintiff to the said defendant, and at his special instance and request, to be paid by the said defendant to the said plaintiff whenever the said defendant should be thereunto afterwards requested; whereby, and by reason of the last mentioned sum of money being and remaining wholly unpaid, an action hath accrued to the said plaintiff to have of and from the said defendant the said sum of — dollars, last above named, the residue of the said sum of — dollars, first above demanded.

**Breach.**

Yet the said defendant, although often requested, hath not as yet paid to the said plaintiff the said sum of — dollars, first

above demanded, or any part thereof, but to pay the same hath hitherto wholly failed and refused, and still doth fail and refuse, to the damage of the said plaintiff of — dollars. And therefore he brings his *suite*.

J. B., p. q.

### 116. Declaration on an Injunction Bond.

*Title of Court and Rules.* Circuit Court for A County, to-wit: — Rules, 18—.

*Queritur.* C. C. complains of D. D. and S. S. of a plea that they render unto him the sum of — dollars, [*the penalty*] which to him the

*Statement of Cause of Action.* said defendants owe and from him unjustly detain, for this, to wit: That heretofore, to wit, on the — day of —, in the year of our Lord eighteen hundred and —, the said defendants, by their

*Bond.* certain writing obligatory, sealed with their seals, and to the court now here shown, the date whereof is the day and year aforesaid, acknowledged themselves to be held and firmly bound unto the said plaintiff in the said sum of — dollars, above demanded, to be

*Condition.* paid to the said plaintiff; to which said writing obligatory a condition was and is annexed to the effect following, to wit:

[*Here set forth the condition.*]

*Injunction dissolved.* And the said plaintiff in fact saith that the injunction aforesaid in the said condition mentioned, hath been in due form of law dissolved by an order of the said — court of — county [or “*cor-*

*Costs Awarded.* *poration*”], sitting as a court of chancery, and that costs against the said D. D. have been awarded by the said court in the premises, to a large amount, to wit, to the amount of — dollars, and the said

*Damages incurred.* D. D. hath incurred, and become liable, by reason of the dissolution of the said injunction, to pay to the said plaintiff damages to a large amount, to wit, to the amount of — dollars. Neverthe-

*Breach of Condition.* less the said D. D., although well knowing the premises, and although by the said plaintiff often required, to wit, on the — day of —, in the year of our Lord eighteen hundred and —, and on divers other days and times, the amount of the judgment aforesaid, and the costs and damages aforesaid, or any part thereof, hath not paid and satisfied to the said plaintiff, according to law, but hath hitherto wholly neglected and refused, and still doth neglect and refuse, to pay and satisfy the sum aforesaid; whereby, by force of the condition aforesaid of the said writing obligatory, an action hath accrued to the said plaintiff to demand and have of and from the said defendants the said sum of — dollars [*the penalty*] first above demanded.

*Breach.* Yet the said defendants, although often requested, have not, nor has either of them as yet paid to the said plaintiff the said sum of — dollars, or any part thereof, but the same to pay have hitherto wholly refused and still do refuse, to the damage of the said plaintiff of \$——. And thereupon he brings his *suite*.

*Conclusion.*

117. *Declaration on Bond with Collateral Condition for Title to Land.*

<i>Title of Court and Rules.</i>	Circuit Court of A County, to wit: — Rules, 18—.
<i>Queritur.</i>	C. O. complains of D. D. of a plea that he render unto him the sum of — dollars, which to him he owes, and from him unjustly detains, for this, to wit: that heretofore, to wit, on the — day of —, in the year of our Lord eighteen hundred and —, the said defendant, by his certain writing obligatory, sealed with his seal, and now to the court here shown, the date whereof is the day and year aforesaid, acknowledged himself to be held, and firmly bound unto the said plaintiff in the said sum of — dollars, above demanded, to be paid to the said plaintiff; Which said writing obligatory was and is subject to a certain condition thereunder written, whereby, after reciting to the effect following, to wit, that the said defendant had agreed, for himself and his heirs, that he would sell and convey unto the said plaintiff a tract or parcel of land lying in the county of A, on the waters of M. river, adjacent to the lands of Thomas Oldham, George Fox, and others, containing by recent survey — acres, be the same, however, ever so much more or less, for the gross sum of — dollars, to be paid in three equal annual payments, from the — day of — then next ensuing, the first payment being due on the — day of —, in the year of our Lord eighteen hundred and —, and that the said defendant had agreed that as soon as the last of the said payments should be made by the said plaintiff, the said defendant would forthwith execute and deliver, properly authenticated for registry, unto the said plaintiff a deed of conveyance for the tract of land aforesaid, with proper, usual and sufficient covenants of warranty, so as to vest in the said plaintiff and his heirs, a good and indefeasible estate in fee simple in the same, it was conditioned that if the said defendant should well and truly perform and fulfil the covenants aforesaid, so that no default therein should be by him made, then that the said obligation should be void, otherwise should remain in full force and virtue, as by the said writing obligatory and the condition thereof, reference being thereunto had, will more fully and at large appear. And although the said plaintiff, according to the tenor and effect, true intent and meaning of the said writing obligatory, did pay to the said defendant each and all and every part of the said several payments, at the times when the same became respectively due and payable, yet the said plaintiff in fact saith that the said defendant hath not executed and delivered to the said plaintiff any deed or conveyance whatsoever for the tract of land aforesaid, but hath wholly neglected and refused so to do, so that the said plaintiff hath not now vested in him a good and indefeasible title in fee simple to the said land. By reason of which said breach the said writing obligatory became and was forfeited, and thereby an action hath accrued to the said plaintiff, to demand and have of and from the said defendant the said sum of — dollars [ <i>the penalty</i> ], above demanded.
<i>Statement of Cause of Action.</i>	
<i>Bond.</i>	
<i>Condition Recited.</i>	
<i>Averment of Plaintiff's Performance.</i>	
<i>Breach of Condition.</i>	
<i>Right of Action inferred.</i>	

**General** Yet the said defendant, although often requested, hath not as yet  
**Breach.** paid the said sum of money above demanded, or any part thereof, to the said plaintiff, but hath hitherto wholly neglected and refused, and still doth neglect and refuse so to do, to the damage of the  
**Conclusion.** said plaintiff of — dollars. And therefore he brings his *suite*.  
W. T. B., p. q.

118. *Declaration against Husband and Wife, on Bond of Wife while Sole.*

**Title of Court and Rules.** Circuit Court of A County, to wit: — Rules, 18—.

**Quoritur.** C. C. complains of D. D. and E. D., his wife, who before her intermarriage with the said D. D. was E. H., of a plea that they render unto him the sum of — dollars, which to the said plaintiff they owe, and from him unjustly detain: For this, to wit: that heretofore, to wit, on the — day of —, in the year of our Lord eighteen hundred and —, the said E. while sole, and before her intermarriage with the said D. D., by her certain writing obligatory, sealed with her seal, and to the court now here shown, the date whereof is the day and year aforesaid, acknowledged herself to be held and firmly bound unto the said plaintiff in the sum of — dollars, to be paid to the said plaintiff when she, the said E., should be thereunto afterwards requested. And the said plaintiff in fact saith that the said E., while she was sole and unmarried, (though often thereunto requested,) did not pay to the said plaintiff the said sum of — dollars, or any part thereof.

**Statement of Cause of Action.** By reason whereof an action hath accrued to the said plaintiff to  
**Making Bond.** demand and have of the said defendants since their intermarriage the said sum of — dollars.

**Non-payment by feme before Marriage.** Yet the said defendants, since their intermarriage, although often requested, have not, nor hath either of them, paid the said sum of — dollars above demanded, or any part thereof, to the said plaintiff, but the same to pay they, the said defendants, have hitherto refused, and still do refuse, to the damage of the plaintiff

**Right of Action Inferred.** of \$—. And therefore he brings his *suite*.

**Breach.**

**Conclusion.**

L. L. B., p. q.

119. *Declaration by an Administrator, against a Surviving Executor, on Bond of Testator.*

**Title of Court and Rules.** Circuit Court for A County, to wit: — Rules, 18—.

**Quoritur.** C. C., administrator of all and singular the goods and chattels, rights and credits, which were of G. H., deceased, at the time of his death, who died intestate, complains of R. R., surviving executor of the last will and testament of J. S., deceased, of a plea that the said defendant render unto the said plaintiff the sum of — dollars, which from him the said defendant unjustly detains, for this, to wit: that heretofore, to wit, on the — day of —, in the year of our Lord eighteen hundred and —, the said J. S., in his life-time, by his certain writing obligatory, sealed with his

**Statement of Cause of Action.**

seal, and to the court now here shown, the date whereof is the day and year aforesaid, acknowledged himself to be held and firmly bound unto the said G. H., in his life-time, in the said sum of — dollars, to be paid to the said G. H. when the said J. S. should be thereunto afterwards requested.

*Breach.*

Nevertheless the said J. S., in his life-time, and the said defendant and W. X., in his life-time, now deceased, and whom the said defendant hath survived, and which said defendant and the said W. X. were executors of the last will and testament of the said J. S., deceased, and the said defendant, surviving executor as aforesaid, after the death of the said W. X., have not, nor hath either of them, as yet paid the sum of — dollars above demanded, according to the tenor and effect of the said writing obligatory, or any part thereof, to the said G. H., in his life-time, or to the said plaintiff since the decease of the said G. H. (to which said plaintiff, after the death of the said G. H., to wit, on the — day of —, in the year of our Lord eighteen hundred and —, administration of all and singular the goods and chattels, rights and credits, which were of the said G. H., deceased, at the time of his death, who died intestate, by the county court of A county, in due form of law was granted); but to pay the same, or any part thereof, to the said G. H., in his life-time, or to the said plaintiff, administrator as aforesaid, since the death of the said G. H., the said J. S., in his life-time, and the said defendant and W. X., executors as aforesaid, after the death of the said J. S., and in the life-time of the said W. X., wholly refused, and the said defendant, surviving executor as aforesaid, hath ever since the death of the said W. X. hitherto wholly refused, and still refuses so to do, to the damage of the said plaintiff, administrator as aforesaid, of the sum of \$——. And thereupon he brings his *suite*. And the said plaintiff brings into court here the letters of administration of the said county court of A county, which give sufficient evidence to the said court here of the grant of administration to the said plaintiff as aforesaid, the date whereof is a certain day and year therein mentioned, to wit: the day and year in that behalf above mentioned, &c.

J. T. B., p. q.

*Profert of*  
*Letters of*  
*Admin'n.*

120. *Declaration in Debt on Administration-Bond by Distributees.*

*Title of Court,* Circuit Court for A County, to-wit :  
*and Rules.* — Rules, 18—.

*Queritur.*

The commonwealth of Virginia, which sues at the relation and for the benefit of C. C., complains of D. D. and S. S. of a plea that they render unto the said plaintiff the sum of — dollars [*the penalty of the bond,*] which to the said plaintiff the defendants owe, and from it unjustly detain; for this, to wit, that heretofore, to-wit, on the — day of — in the year of our Lord eighteen hundred and —, the said defendants, by their certain writing obligatory, sealed with their seals, and to the court now here shown, the date whereof is the day and year aforesaid, acknowledged them-

*Statement of*  
*Cause of*  
*Action.*  
*Bond.*

- Condition.** selves to be held and firmly bound unto the said Commonwealth of Virginia, in the said sum of — dollars, above demanded, to be paid to the said Commonwealth. To which said writing obligatory a condition was and is annexed to the effect following, to wit: that if the said D. D., administrator of all and singular the goods and chattels, rights and credits, which were of J. S., deceased, at the time of his death, who died intestate, should faithfully perform the duties of his office to the best of his judgment, the said writing should be void, or otherwise should remain in full force. And the said plaintiff, in fact, says that the said defendants have not kept, performed and fulfilled the condition aforesaid of the said writing obligatory, but have broken the same; and that the said D. D. did not deliver and pay to the persons by law entitled to receive the same, the goods, chattels and credits which were found remaining upon account of the said administration. And the said plaintiff further says that a suit was instituted on the chancery side of the circuit court for the county of A, by C. C., to recover from the said D. D. that portion of the balance in his hands as administrator of J. S., deceased, to which he was by law entitled, and the said circuit court made an order in the said suit directing the said administrator to settle an account of his administration on the estate of the said J. S., deceased, before one of the commissioners of the said court; and M. G., a commissioner of the said court, made report of the account aforesaid, by which it appeared that D. D. had in his hands as administrator as aforesaid, a sum of money of which the said C. C. was by law entitled to a certain portion, to wit, to the sum of — dollars, with interest after the rate of — per centum per annum, from the — day of —, in the year of our Lord eighteen hundred and —, till payment, which account and report was confirmed and allowed by the court; and thereupon, on the — day of —, in the year of our Lord eighteen hundred and —, a decree was rendered by the said court in favor of the said C. C. against the said D. D. for the said sum of — dollars, with interest as aforesaid; on which decree an execution of *fiat facias* has issued, and been returned "no effects." And the plaintiff avers that the said decree remains wholly due and unpaid. So the plaintiff says that the said defendants have not kept and performed the condition of the obligation aforesaid, but although often requested to keep it, have wholly broken the same, whereby an action has accrued to the said plaintiff to have of and from the said defendants the said sum of — [*the penalty*] dollars above demanded.
- Breach of Condition.**
- Right of Action inferred.**
- Breach.** Yet the said defendants, although often requested, have not, nor hath either of them paid to the said plaintiff, or to the said C. C., the said sum of \$ — [*the penalty*], or any part thereof; but the same to pay they have hitherto altogether refused and still refuse, to the damage of the plaintiff of \$ —; And therefore the said plaintiff brings its *suite*.

121. *Declaration in Debt on a Judgment (or Decree) against an Executor, Suggesting a Devastavit.*

(V. C. 1873, c. 126, § 24; 2 Rob. Pr. (2nd ed.) 127 & seq; Sands' Forms, 474; 2 Chit. Pl. 484.)

*Title of Court* Circuit Court for A County, to wit:  
*and Rules.* — Rules, 18—.

*Queritur.*

C. C. complains of D. D., executor of the last will and testament of E. E., deceased, of a plea that the said defendant render unto the said plaintiff the sum of — dollars, with lawful interest thereon from the — day of —, 18—, until paid, which to him the said defendant owes, and from him unjustly detains, for this, to wit: that heretofore, to wit, at a — court held for the county [or "*corporation*"] of —, at the court-house thereof, on the — day of —, in the year 18—, by the judgment [or "*decree*"] of that court, the said plaintiff recovered against the said defendant, as executor of the last will and testament of the said E. E., deceased, the said sum of, &c., [*reciting the judgment or decree as to principal, interest, and costs*]; whereof the said defendant, as executor as aforesaid, is convict, as by the record thereof, remaining in the same court, manifestly appears; which said judgment [or "*decree*"] still remains in full force and effect, not in the least

*Statement of Cause of Action.*

*Judgment Recovered.*

*Execution of Fi.Fa. issued.*

reversed, annulled, set aside, or satisfied. And the said plaintiff says that afterwards, to wit, on the — day of —, 18—, a writ of *fi. facias*, bearing date the day and year last aforesaid, was sued out of the said — court of the said county [or "*corporation*"] of —, upon the said judgment [or "*decree*"] directed to the sheriff of the said county [or "*the sergeant of the said corporation*"] of —, whereby the said officer was commanded, that of the goods and chattels of the said E. E., deceased, in the hands of the said defendant, to be administered, he should cause to be made the said sum of — dollars, [*the amount named in the writ,*] upon which writ of *fi. facias* the said officer, by his deputy, did afterwards make a return to the effect following, [*copy the return,*] as by the said writ, and the return thereon remaining in the clerk's office of the said — court of the — of — appears. And the

*Officer's Return.*

*Assets in the Executor's Possession.*

plaintiff avers that at the time of the said judgment, to wit, on the — day of —, 18—, divers goods and chattels, which were of the said E. E., at the time of his death, of great value, to wit, of the value of the said sum of — dollars, in form aforesaid recovered, had come to the hands of the said defendant, as executor as aforesaid, to be administered, and which said goods and chattels the said defendant, executor as aforesaid, elogned, wasted, and converted and disposed of to his own use. Whereby an action hath accrued to the said plaintiff to demand and have of and from the said defendant the said sum of — dollars first above demanded, with lawful interest thereon as aforesaid.

*Devastavit.*

*Right of Action inferred.*

*Breach.*

Nevertheless, the said defendant, although often requested so to do, hath not paid to the said plaintiff the said sum of — dollars above demanded, with lawful interest thereon as aforesaid, or any

part thereof, but the same to pay hath hitherto wholly failed and refused, and still doth fail and refuse, to the damage of the said plaintiff \$——. And therefore he brings his *suite*.

R. H. W., p. q.

122. *Declaration on Official Bond of Executor, Suggesting a Devastavit.*

(V. C. 1873, c. 126, § 24.)

<b>Title of Court and Rules.</b>	Circuit Court for A County, to wit : — Rules, 18—:
<b>Queritur</b>	The Commonwealth of Virginia, which sues at the relation and for the benefit of C. C., complains of D. D., S. S. and F. F., who are surviving obligors of themselves, G. G. and H. H. of a plea that the said defendants render to the said plaintiff the sum of — dollars [ <i>the penalty of the executor's bond</i> ], which to the said plaintiff the said defendants owe, and from it unjustly detain; for this,
<b>Statement of Cause of Action.</b>	to wit: that heretofore, to wit, on the — day of —, in the year 18—, the said defendants, together with the said G. G. and H. H.,
<b>Making Bond. Profert.</b>	who are now deceased, by their certain writing obligatory, sealed with their seals, and to the court now here shown, the date whereof is the day and year aforesaid, acknowledged themselves to be held and firmly bound unto the said plaintiff in the said sum of — dollars above demanded, to be paid to the said plaintiff. To which
<b>Condition.</b>	said writing obligatory a condition was and is annexed, to the effect following, to wit, that if the said D. D., executor of the last will and testament of E. E., deceased, should faithfully perform the duties of his office to the best of his judgment, the said writing should be void, or else should remain in full force. And the said
<b>Breach of Condition.</b>	plaintiff, in fact, says that the said defendants have not kept, performed and fulfilled the condition aforesaid of the said writing obligatory, but have broken the same; and that the said D. D. did not, to the best of his judgment, faithfully perform the duties of his office as executor of the last will and testament of the said E.
<b>Suit against Executor.</b>	E., deceased, that is to say, in the particulars following, namely: that the said C. C. did institute in the — court for the — of —, a suit to recover of the said D. D., executor as aforesaid, the amount of a promissory note made by the said E. E. in his lifetime, and payable to the said C. C., for the sum of — dollars, and
<b>Judgment Recovered.</b>	did on the — day of — 18—, in the said court obtain a judgment on the said promissory note against the said D. D., executor as aforesaid, for the sum of — dollars with interest after the rate of — per centum per annum, from the — day of —, 18—, until paid, and the costs, as by the record of the said judgment, remaining in the same court manifestly appears; which said judgment still remains in full force and effect, not in the least reversed, annulled, set aside or satisfied. And the said plaintiff says, that
<b>Execution Issued.</b>	afterwards, to wit, on the — day of —, 18—, a writ of <i> fieri facias</i> , bearing date the same day and year last aforesaid, was sued out of the said — court for the said — of —, upon the said judgment directed to the sheriff of the said county [or " <i>sergeant of the said corporation</i> "] of —, whereby the said officer was com-



Return. mandated that of the goods and chattels of the said E. E., deceased, in the hands of the said D. D. to be administered, he should cause to be made the said sum of — dollars, [*the amount named in the fl. fa.*] upon which writ of *fleri facias*, the said officer, by his deputy, did afterwards make a return to the effect following, [*copy the return,*] as by the said writ, and the return thereon remaining in the clerk's office of the said — court of the — of —, appears.

Averment of Assets. And the said plaintiff avers that at the time of the said judgment, to wit, on the — day of —, 18—, divers goods and chattels which were of the said E. E., at the time of his death of great value, to wit, of the value of the said sum of — dollars, in form aforesaid recovered, had come to the hands of the said D. D., as executor as aforesaid, to be administered, and which said goods and chattels the said D. D., executor as aforesaid, elogned, wasted, and converted and disposed of to his own use; Whereby an action hath accrued to the said plaintiff to demand and have of and from the said defendants, the said sum of — dollars first above demanded.

Devastavit. Yet the said defendants, although often requested so to do, have not paid to the said plaintiff, nor to the said C. C., the said sum of — dollars first above demanded, or any part thereof; but the same to pay have, and each of them hath hitherto wholly failed and refused, and still do, and each of them doth fail and refuse, to the damage of the said plaintiff \$ —. And therefore the said plaintiff brings its *suite*.

Breach.

Conclusion.

H. C. C., p. q.

123. *Declaration in Debt, on Indemnifying Bond.*(V. C. 1873, c. 149, § 4, 5, 6; *Ante*, p. 831-2; Sands' Forms, 475.)

Title of Court and Rules. Circuit Court for A County, to wit: — Rules, 18—.

Queritur. L. M., Sheriff of the county [or *Sergeant of the corporation*] of A, who sues at the relation and for the benefit of C. C., complains of E. E. and S. S., of a plea that they render unto him the sum of — dollars [*the penalty of the bond*], which to him they owe and from him unjustly detain: For this, to wit: that heretofore, to wit, on the — day of —, 18—, the said defendants, by their certain writing obligatory, sealed with their seals, and to the court now here shown, the date whereof is the day and year aforesaid, acknowledged themselves to be held and firmly bound unto the said plaintiff in the said sum of — dollars above demanded, to be paid to the said plaintiff. To which said writing obligatory a condition was and is annexed, to the effect following, to wit: that whereas, the said E. E. had sued out of the — court of the — of —, a writ of *fleri facias* against the goods and chattels of one D. D., upon a judgment obtained in the said court, which writ, with the legal costs attending the same, amounted to the sum of — dollars, and was directed to the said plaintiff, sheriff (or *sergeant*) as aforesaid. And whereas the said plaintiff as such officer, by virtue of the said writ to him directed, had, by J. B., his deputy, levied the same on —, [*describe the goods and chattels levied*]

Statement of Cause of Action.

Making Bond.

Condition.

	<i>upon,</i> ] and a doubt having arisen whether the said property was liable to such levy, the said plaintiff, as such officer as aforesaid, had applied to the said E. E. for an indemnifying bond, according
To Indemnify Officers.	to the statute in such case made and provided; If, therefore, the said defendants should indemnify the said plaintiff against all damages which he might sustain in consequence of the seizure or sale of the property on which the said execution had been levied, and
To Indemnify Claimant.	should pay to any claimant of such property all damages which he might sustain in consequence of such seizure or sale, and should
To Warrant Title to Purchaser.	also warrant and defend to any purchaser of the property such estate or interest therein as should be sold, then the said writing obligatory to be void, otherwise to remain in full force and virtue.
Averment of Sale.	And the said plaintiff avers that the said property was thereupon, to wit, on the — day of —, 18—, by him, as such officer as aforesaid, through his said deputy, J. B., by virtue and in pursuance of the execution aforesaid, sold to satisfy the same, and
Averment of Claimant's Title.	that the said property, at the time of the seizure and sale of it as aforesaid, under the execution aforesaid, was the lawful, rightful, and absolute property of the said C. C., and not the property of the said D. D., and that the said C. C., by the seizure and sale of the said property as aforesaid, hath sustained great damage, to
Breach of Condition.	wit, to the value of — dollars. And the said plaintiff protesting that the said defendants, or either of them, have not in anything performed, fulfilled, or kept the said condition of their said writing obligatory, further avers that the said defendants, or either of them, although often requested, have not paid or satisfied the said C. C. the damages sustained by him in consequence of the seizure and sale of the property aforesaid, or any part thereof, but
Right of Action inferred.	have hitherto wholly refused, and still do neglect and refuse so to do. By means whereof, and by virtue of the statute in such case made and provided, an action hath accrued to the said plaintiff to have and demand of the said defendants the said sum of — dollars first above demanded.
Breach.	Yet the said defendants, or either of them, although often requested, have not as yet paid to the said plaintiff, or to the said C. C., the said sum of — dollars first above demanded, or any part thereof, but the same to pay have, and each of them hath, hitherto wholly failed and refused, and still do fail and refuse, to the damage of the plaintiff \$——. And therefore he brings his
Conclusion.	<i>suite.</i>

D. G. W., p. q.

124. *Declaration in Debt by Heir, on Title-bond to Ancestor, Assigning Breach after Ancestor's Death.*

(Sands' Forms, 478; Rob. Forms, 437.)

<i>Title of Court, and Rules.</i>	Circuit Court for the County of A, to wit: — Rules, 18—.
<i>Queritur.</i>	C. C., the son and heir at law, and devisee of P. C., deceased, complains of D. D., administrator of all and singular the goods, chattels and credits which were of S. D., deceased, at the time of his death, who died intestate, of a plea that he render unto the said

plaintiff the sum of — dollars, which from him he unjustly detains: For this, to wit: that heretofore, to wit, on the — day of —, 18—, the said S. D., in his life-time, by his certain writing obligatory, sealed with his seal, and now to the court here shown, the date whereof is the day and year aforesaid, acknowledged himself to be held and firmly bound unto the said P. C., deceased, and to his heirs and assigns, in the said sum of — dollars, to be paid to the said P. C., his heirs and assigns. To which said writing obligatory a condition was and is annexed, to the effect following, to wit: that if the said P. C., his heirs and assigns, shall peaceably and quietly hold, possess, and enjoy, in fee-simple, without let, molestation, obstruction, disturbance or eviction from any person or persons claiming title, right, interest or property therein, or in any part thereof, the tract or parcel of land lying in the county of —, known by the name of —, containing by survey — acres, and bounded as follows, to wit: [*follow the description of the land as in the condition*], then the said writing obligatory to be void, otherwise to remain in full force and virtue. And the said plaintiff avers that one J. S., claiming by a title adverse and superior to the title of the said S. D., and to that of the said plaintiff, as heir of the said P. C., did, after the death of the said S. D. and of the said P. C., institute a suit for the said land in the — court for the said county of —, against the said plaintiff, to whom, upon the death of the said P. C., the said land had descended and passed, as the heir at law and the devisee of the said P. C., and actually recovered the said land, by verdict and judgment [*which upon appeal has been affirmed*], and sued out execution thereon, and was thereby put in possession of the said land, and is actually in possession thereof at this time, whereby the said plaintiff is disturbed in, and has been evicted out of the quiet possession and enjoyment of the land aforesaid; whereby the condition aforesaid is wholly broken; and thereby an action hath accrued to the said plaintiff to demand and have of and from the said defendant, administrator as aforesaid, the said sum of — dollars above demanded.

Yet the said S. D., in his life-time, nor the said D. D., since the death of the said S. D., hath not paid the said sum of — dollars above demanded, nor any part thereof, to the said P. C. in his life-time, nor the said plaintiff, since his death, but the same to pay they have always hitherto wholly failed and refused, and still do fail and refuse, to the damage of the said plaintiff \$—. And therefore he brings his *suite*.

C. T. B., p. q.

125. *Declaration in Debt, on Sheriff's Bond.*

(V. C. 1878, c. 12, § 6, 7; Id. c. 49, § 3; 1 Rob. Forms, 456.)

*Title of Court, and Rules.* Circuit Court of A County, to wit:  
— Rules, 18—.

*Queritur.* The Commonwealth of Virginia, which sues at the relation and for the benefit of C. C., complains of D. D., S. S., G. G., and H. H., of a plea that the said defendants render unto the said plaintiff the sum of — dollars [*the penalty of the bond*], which to the said plaintiff the

**Statement of Cause of Action.** said defendants owe, and from it unjustly detain, For this, to wit: that heretofore, to wit, on the — day of —, in the year 18—, the said defendants, by their certain writing obligatory, dated on the

**Making Bond.** day and year last aforesaid, sealed with their seals, an attested copy whereof is to the court now here shown, the original of the said writing obligatory being entered of record, and filed in the county court of — county, acknowledged themselves to be held and firmly bound unto the said plaintiff in the sum of — dollars

**Condition.** above demanded, to be paid to the said plaintiff: To which said writing obligatory a condition was and is annexed, to the effect following, to wit: that whereas the said D. D. was duly elected and

**Stipulation by Sheriff.** qualified as sheriff of the county of —, for four years from the first day of July, in the year 18—, if the said D. D. should faithfully discharge the duties of his said office during the time of his continuance therein, then the said writing obligatory was to be void, otherwise to remain in full force and virtue. And the said plaintiff avers that the said D. D. did not observe, fulfil or perform the said condition of the said writing obligatory, but therein wholly failed and made default; and for assigning a breach of the condition of the writing obligatory, the said plaintiff says that heretofore, to wit, on the — day of —, 18—, at a — court, held for the — of —, before the judge of the said court, by the judgment of that court, the said C. C. recovered against a certain J. R. and a certain M. M. a certain sum of — dollars, and also — dollars for the costs by the said C. C. about his suit expended; but the said judgment was to be discharged by the payment of — dollars, with interest thereon after the rate of — per centum per annum from the — day of —, 18—, until paid, and the costs aforesaid, as by the record and proceedings thereof in the said — court still remaining, will more fully appear. And the said plaintiff further says, that the said judgment being in full force, and the money thereby recovered remaining unsatisfied, the said C. C., for obtaining satisfaction of the same, afterwards, to wit, on the — day of —, 18—, sued out of the said — court a writ of *feri facias*, directed to the sheriff of — county, by which said suit the said sheriff was commanded, that of the goods and chattels of the said J. R. and M. M., in the said sheriff's bailiwick, he should cause to be made the said sum of — dollars, and — dollars, the costs aforesaid; and the said sheriff was also commanded to make known how he should execute that writ, at the rules to be holden for the said — court, in the clerk's office thereof, on the — day of —, 18—, next after the date of the said writ, and also to have then and there the said writ; to which said writ a memorandum was subjoined to the effect that the same was to be discharged by the payment of — dollars, with interest thereon after the rate of — per centum per annum, from the — day of —, 18—, until payment, and the costs therein mentioned, to wit, the said sum of — dollars. And the said plaintiff further

**Execution Issued.** says that the said writ of *feri facias*, with the memorandum thereto subjoined, as aforesaid, and before the return-day thereof, to wit, on the — day of —, 18—, at the said county of —, was de-

**Tenor of Fi. Fa.**

**Delivery of Writ to Sh'ff.**

livered to one J. B., who then and there, and from thence, until and after the return of the said writ, was a duly qualified deputy of the said D. D., who then and there, and from thence, until and after the return of the said writ, was sheriff of the said county of —, to be executed in due form of law. By virtue of which writ the said J. B., so being a deputy of the said D. D., who was sheriff of the said county of —, as aforesaid, afterwards, and before the return of the said writ, to wit, on the — day of —, 18—, at the county of —, and within his bailiwick, as such deputy-sheriff, seized and took in execution divers goods and chattels of the said J. R. and the said J. M. of great value, to wit, of the value of the said — dollars, with interest thereon as aforesaid, and the costs aforesaid, out of which he might have levied the same. Yet the said J. B., so being such deputy of the said D. D., sheriff of the county of —, as aforesaid, not regarding his duty as such, but contriving and intending wrongfully, and unjustly designing to injure the said C. C. in that behalf, and to deprive him of the said last-mentioned money, with interest and costs, and of the means of obtaining the same, did not pay the said money, with interest and costs as aforesaid, to the said C. C., at the return of the said writ; and at the return of the said writ, to wit, at the rules holden in the clerk's office of the said — court, on the — day of —, 18—, the said J. B., deputy for the said D. D., sheriff of the said county of —, did falsely and deceitfully make a return upon the said writ, in the words following, to wit, [*copy the return with the deputy's signature*], as by the said writ, and the return thereof, remaining of record in the said — court, fully appears. And the said plaintiff avers that the said return is false and deceitful in this, that the said J. B., deputy as aforesaid, did not take any security for the delivery, at the time and place of sale, of the said —, the property of J. R. and M. M., upon which the said writ of *fiert facias* has been levied, but suffered the said — to remain in the possession of the said J. R. and M. M. after the said writ of *fiert facias* had been levied thereon, without the leave or license of the said C. C., and against his will and consent. By means of which said premises the said C. C. was injured and deprived of the means of obtaining the said sum of — dollars, with interest and costs as aforesaid; and the said sum, with interest and costs as aforesaid, is still wholly unpaid. And so the said plaintiff says that, by reason of the breach of the condition of the said writing obligatory, so above assigned as aforesaid, the said writing obligatory became and was forfeited, and thereby an action has accrued to the said plaintiff, to demand and have of the said defendants the sum of — dollars, first above demanded.

**Breach.** Yet the said defendants, although often requested, have not, nor has either of them, as yet paid to the said plaintiff, or to the said C. C., the said sum of — dollars, first above demanded; but to pay the same they have, and each of them hath, wholly failed and refused, and still do refuse and fail so to do, to the damage of the said plaintiff — dollars. And therefore the said plaintiff brings its *suite*.

**Conclusion.**

126. *Declaration in Debt, on Constable's Bond.*

(V. C. 1873, c. 12, § 6, 7; Id. c. 49, § 16; 1 Rob. Forms, 460.)

**Title of Court** Circuit Court for A County, to wit:  
**and Rules.** — Rules, 18—.

**Queritur.** The Commonwealth of Virginia, which sues at the relation and for the benefit of C. C., complains of D. D., S. S., G. G. and H. H., of a plea that they render unto the said plaintiff the sum of —

**Statement of Cause of Action.** dollars, [*the penalty of the bond*] which to the said plaintiff they owe and from it unlawfully detain; for this to wit, that heretofore to wit, on the — day of —, in the year of our Lord, 18—, the

**Making Bond.** said defendants, by their certain writing obligatory, dated on the day and year last aforesaid, sealed with their seals, an attested copy whereof is to the court now here shown, the original of the said writing obligatory being entered of record and filed in the county court of — county, acknowledged themselves to be held and firmly bound unto the said plaintiff in the said sum of — dol-

**Condition.** lars above demanded, to be paid to the said plaintiff; To which said writing obligatory a condition was and is annexed, to the effect following, to wit: that whereas the said D. D. was duly elected and qualified a constable of the county of —, for the magisterial district of — in the said county for two years, from the first day of July, in the year 18—, if the said D. D. should faithfully discharge the duties of his said office during the time of his continuance therein then the said writing obligatory was to be void, otherwise to remain in full force and virtue. And the said plaintiff avers that the said D. D. did not observe, fulfil and perform the said condition of the said writing obligatory, but therein wholly failed and made default; and for assigning, more particularly, a breach of the condition of the said writing obligatory, the said plaintiff says that after the said bond was entered into and acknowledged as aforesaid, to wit, on the — day of — 18—, in the said county of —, the said C. C. made affidavit according to law before one R. W., then and there being a justice of the peace in and for the said county, that one T. T. was justly indebted to him in the sum of — dollars, with lawful interest thereon from the — day of — 18—, until paid, for — years' rent, due and in arrear, reserved upon contract for certain premises situated in the said county of —, and thereupon obtained from the said R. W. a warrant of distress, directed to any constable of the said county, commanding that of the goods and chattels of the said T. T., in and upon the said premises or not removed therefrom more than thirty days, there should be distrained sufficient to satisfy the said arrears of rent with interest thereon as aforesaid; which said warrant afterwards, to wit, on the day and year last aforesaid, was delivered to the said D. D., as constable as aforesaid; and afterwards, to-wit, on the day and year last aforesaid, by authority and in pursuance of the said warrant, divers goods and chattels of the said T. T. of great value, to wit, of the value of — dollars, found on the said premises, were, by the said D. D., as constable as aforesaid, duly and lawfully distrained and levied upon in order to satisfy the said arrears of rent, with interest as aforesaid; by reason

**Breach of Condition Averred.**  
**Particulars of Breach.**

whereof, it became and was the duty of the said D. D., as constable as aforesaid, to sell the said goods, or so much thereof as should be necessary, at public auction for cash, after giving due and lawful public notice thereof. And the said plaintiff avers that the said D. D., constable as aforesaid, did not, in a reasonable time, proceed to sell according to law all the goods and chattels so distrained and levied upon, but neglected and failed to sell certain of such goods and chattels of great value, to wit, of the value of — dollars, which were necessary and ought to have been sold, whereby, and by reason of such neglect and failure, there remains unpaid of the said rent a large sum, to wit, the sum of — dollars, which might and would have been paid, but for the said neglect and failure of the said D. D., constable as aforesaid.

**Further Particulars.**

And the said plaintiff, for assigning a further breach of the said condition of the said writing obligatory, says that after the execution thereof, to wit, on the — day of —, 18—, the said C. C. gave into the hands of the said D. D., to collect, as such constable as aforesaid, divers claims, which the said C. C. then had against certain persons, and which were justly due and payable to him from them respectively, to wit: [*Specify the claims as stated in the constable's receipt, and show from what dates interest accrues on them severally,*] amounting in the whole to a large sum of money, to wit, to the sum of — dollars, and bearing interest respectively as aforesaid; for which said claims the said D. D., constable as aforesaid, then gave his receipt in writing, dated on the said — day of —, 18—, and signed by him in his official character. And the said plaintiff says that the said claims might have been collected by the said D. D., as such constable as aforesaid, and each and all of them were by him collected and received, together with the interest aforesaid thereon, amounting in the whole to a large sum of money, to-wit, to the sum of — dollars, which said sum of — dollars, and every part thereof, the said D. D., constable as aforesaid, although often requested, has always hitherto failed and refused to pay to the said C. C., and still does fail and refuse, nor has any other person paid the same, or any part thereof, for him. And so the said plaintiff says that, by reason of the breaches of the condition of the said writing obligatory, so above assigned as aforesaid, the said writing obligatory became and was forfeited, and thereby an action has accrued to the said plaintiff to have and demand of the said defendants the sum of — dollars first above demanded.

**Right of Action inferred.**

**Breach.**

Yet the said defendants, although often requested, have not, nor has either of them, as yet paid to the said plaintiff, or to the said C. C., the said sum of — dollars first above demanded, or any part thereof, but to pay the same they have, and each of them hath, wholly failed and refused, and still do refuse and fail so to do, to the damage of the said plaintiff \$ —. And therefore the said plaintiff brings its *suite*.

**Conclusion.**

127. *Declaration in Debt, on Attachment-Bond.*

(V. C. 1873. c. 148, § 8; Id. c. 12, § 6.)

*Title of Court and Rules.* Circuit Court for A County, to-wit: — Rules, 18—.

*Queritur.* The Commonwealth of Virginia, which sues at the relation and for the benefit of C. C., complains of D. D. and S. S., of a plea that they render unto the said plaintiff the sum of ——— dollars, [the penalty of the bond,] which to the said plaintiff the said defendants owe, and from it unjustly detain: For this, to wit: that

*Statement of Cause of Action.* heretofore, to wit, on the ——— day of ———, in the year 18—, the said defendants, by their certain writing obligatory, dated on

*Making Bond.* the day and year last aforesaid, sealed with their seals, an attested copy whereof is to the court now here shown, the original of the said writing obligatory being filed in the clerk's office of the ——— court for the ——— of ———, acknowledged themselves to be held and firmly bound unto the said plaintiff in the sum of ——— dol-

*Condition.* lars above demanded, to be paid to the said plaintiff: To which said writing obligatory a condition was and is annexed, to the effect following, to wit: that whereas the said C. C. did, &c. [pursuing the recital in the condition of the bond]; now if the said C. C. shall pay all costs and damages which may be awarded against him, or sustained by any person, by reason of his suing out the said attachment, then the said writing obligatory was to be void, otherwise to remain in full force and virtue. And the said plaintiff avers that

*Breach of Condition Averred.* after the making and approval of the said writing obligatory, to wit, on the ——— day of ———, 18—, one of the officers to whom the said attachment was directed, levied the same on and took possession of certain estate of the said C. C., and kept the same until the ——— day of ———, 18—; and that thereupon, before the ——— court of ——— county, to which court the said attachment was returned, defence was made in the said case, that the said attachment was sued out without sufficient cause, whereupon such proceedings were had that judgment was entered by the said court, upon the said defence, for the said C. C., against the said D. D., for ——— dollars, as the damages sustained by the said C. C. by reason of the suing out of the said attachment, as by the record of the said judgment, still remaining in the said court, will more fully appear. And the said plaintiff says that no part of the said damages by the said C. C. sustained, and to him awarded by the judgment aforesaid, against the said D. D., has been paid to the said C. C., and that so the condition of the said writing obligatory has been broken, and that by reason of the said breach the said writing obligatory became and was forfeited; whereby an action has accrued

*Right of Action inferred.* to the said plaintiff to have and demand of the said defendants the sum of ——— dollars first above demanded.

*Breach.* Yet the said defendants, although often requested, have not, nor has either of them, as yet paid to the said plaintiff, or to the said C. C., the said sum of ——— dollars first above demanded, or any part thereof, but to pay the same they have, and each of them hath, wholly failed, and still do fail and refuse so to do, to the damage of the said plaintiff \$———. And therefore the said plaintiff brings

*Conclusion.* its *suite*. G. A. W., p. q.



128. *Declaration in Debt, on an Appeal Bond.*(V. C. 1873, c. 178, § 13; *Ante*, p. 862; Rob. Forms, 432.)

*Title of Court and Rules.* Circuit Court for A County, to wit:  
— Rules, 18—.

*Queritur.*

C. C. complains of D. D. and S. S., of a plea that they render unto him the sum of — dollars [*the penalty of the bond*], which

*Statement of Cause of Action.*

to him they owe and from him unjustly detain: For this, to wit: that heretofore, to wit, on the — day of —, in the year 18—, the said defendants, by their certain writing obligatory,

*Making Bond.*

sealed with their seals, and to the court now here shown, the date whereof is the day and year aforesaid, acknowledged themselves to be held and firmly bound unto the said plaintiff in the said sum of

*Condition.*

— dollars, to be paid to the said plaintiff: To which said writing obligatory, a condition was and is annexed to the effect following, to wit: "The condition," &c., [*copy the condition to the end*].

*Breach of Condition averred.*

And the said plaintiff in fact says that the said D. D. did not prosecute the said appeal with effect, and that at a term of the supreme court of appeals, held at —, on the — day of —, 18—, it was considered that the judgment aforesaid of the said — court for the — of —, recovered by the said plaintiff against the said D. D. as aforesaid, for — dollars damages, and interest thereon after the rate of — per centum per annum, from the — day of —, until paid, and — dollars costs, be in all things affirmed, and that the said plaintiff recover against the said D. D. damages according to law, after the rate of six per centum per annum, to be computed on — dollars, [*the amount of the recovery, including interest and costs*], from the — day of —, 18—, [*the date when the appellate process took effect*], until a copy of the said decision of the supreme court of appeals aforesaid should be entered in the order-book of the said — court, which the said plaintiff avers was done on the — day of —, 18—, which said damages should be in satisfaction of all interest during the time aforesaid, and amount to the sum of — dollars, and — dollars costs, by the said plaintiff expended in defending the said appeal. And the said plaintiff avers that the said D. D. has not paid to the plaintiff the said sum of — dollars damages, with interest thereon after the rate of — per centum per annum, from the — day of —, 18—, until paid, and — dollars costs recovered against him as aforesaid, by the judgment of the said — court, and the said — dollars for damages, and — dollars costs, awarded against the said D. D. by the said supreme court of appeals, nor any part of either of said sums, and so hath broken the condition aforesaid of the said writing obligatory: Whereby the writing obligatory aforesaid hath become forfeited, and an action hath accrued to the plaintiff to demand and have of the said defendants the said sum of — dollars, first above demanded.

*Right of Action inferred.*

*Breach.*

Yet the said defendants, although often requested, have not, nor has either of them, as yet paid to the said plaintiff the said sum of — dollars first above demanded, nor any part thereof, but

the same to pay the said defendants have, and each of them hath, hitherto wholly failed and refused, and still do fail and refuse, to the damage of the said plaintiff \$——. And therefore he brings his *suite*.

C. V., p. q.

### 129. Declaration in Debt, on Arbitration-Bond.

(*Ante*, p. 147 ; Rob. Forms, 485 ; 2 Chit. PL 895.)

**Title of Court and Rules.** Circuit Court of A County, to wit: — Rules, 18—.

**Queritur.** C. C. complains of D. D., of a plea that he render unto the said plaintiff the sum of —— dollars, [*the penalty of the arbitration-bond,*] which to the said plaintiff he owes, and from him unjustly detains: For this, to wit: that heretofore, to wit, on the —— day of ——, in the year 18——, the said defendant, by his certain writing obligatory, sealed with his seal, and to the court now here shown, the date whereof is the day and year aforesaid, acknowledged himself to be held and firmly bound unto the said plaintiff in the just and full sum of —— dollars, to be paid to the said plaintiff: To which said writing obligatory, there was and is a condition annexed, to the effect following, to wit: that whereas, [*pursue the recital of the condition, and then say,*] it was provided that if the said defendant should well and truly abide by and perform the award which should be made in the case by the referees aforesaid, or any two of them, then the said writing obligatory should be void, otherwise should remain in full force and virtue. And the said plaintiff says that the said referees having taken upon themselves the burden of the said arbitration, did in due manner, and within the time for that purpose appointed, to wit, on the —— day of ——, 18—, duly make and publish their award in writing, subscribed with their own proper hands, of and concerning the said matters in difference between the said parties, ready to be delivered to the said parties in difference, or such of them as should desire the same, and bearing date the day and year last aforesaid, and did thereby award and direct that the said defendant should pay to the said plaintiff the sum of —— dollars, [*set out the award so far as relates to the payment of money,*] with lawful interest on the said sum so awarded, from the —— day of ——, 18—, until paid, and —— dollars for the costs of the award; of which award the said defendant then and there had notice. And the said plaintiff avers that the said defendant has not, although often requested, as yet paid to the said plaintiff the said sum of —— dollars, with interest as aforesaid, and the costs aforesaid, or any part of either, and so the said plaintiff says that the said defendant did not well and truly abide and perform the award of the said referees, and so hath broken the condition of the said writing obligatory. By reason whereof an action hath accrued to the said plaintiff to have and demand of the said defendant the said sum of —— dollars, first above demanded.

**Breach.** Yet the said defendant, although often requested, has not as yet

paid to the said plaintiff the said sum of ——— dollars, first above demanded, or any part thereof, but to pay the same has hitherto wholly failed and refused, and still doth fail and refuse, to the damage of the said plaintiff \$———. And therefore he brings his *suite*.

U. H. W., p. q.

### 130. *Declaration in Debt, on Award.*

(*Ante*, p. 146 ; 2 Chit. Pl. 395.)

<p><i>Title of Court and Rules.</i></p> <p><i>Queritur.</i></p> <p><i>Statement of Cause of Action.</i></p> <p>1st Count.</p> <p>Submission.</p> <p> </p> <p>Award.</p> <p> </p> <p>Notice of Aw'd.</p> <p>Default.</p> <p>Right of Action inferred.</p> <p>2nd Count.</p> <p>Indeb's Count.</p>	<p>Circuit Court for A County, to wit:</p> <p>—— Rules, 18—.</p> <p>C. C. complains of D. D., of a plea that he render unto him the sum of ——— dollars, [<i>sum awarded to be paid, or if there are several counts, the aggregate of them all,</i>] which to the said plaintiff the said defendant owes, and from him unjustly detains: For this, to wit: that whereas certain differences having arisen, and being depending between the said plaintiff and the said defendant, the said plaintiff and the said defendant, by two several writings obligatory, bearing date each on the ——— day of ———, 18—, mutually promised, and bound themselves each to the other, in certain penal sums therein mentioned, which said writings obligatory were respectively conditioned to—[<i>set out the substance of the condition.</i>] And the said plaintiff further says, that the said A. A., the arbitrator aforesaid, having taken upon himself the burden of the said arbitration, did in due manner, and within the time for that purpose appointed, to wit, on, &amp;c., [<i>date of award,</i>] duly make and publish his award in writing, subscribed with his own proper hand, of and concerning the said matters in difference between the said parties, ready to be delivered to the said parties in difference, or such of them as should desire the same, and bearing date the day and year last aforesaid, and did thereby award and direct that the said defendant should pay the said plaintiff the sum of ——— dollars, [<i>set out the award so far as relates to the payment of money,</i>] with lawful interest thereon from the ——— day of ———, 18—, until paid, and ——— dollars, as the costs of the award, which said sums when paid should be in full satisfaction of all claims or demands of the said plaintiff, upon or against the said defendant for or in respect of the said matters in difference, as by the said award, reference being thereunto had, will more fully appear; of which said award the defendant, on the day and year last aforesaid, had notice. And the said plaintiff says that the said defendant has not as yet paid to the said plaintiff the said sum of ——— dollars, so awarded, with interest as aforesaid, and the costs aforesaid, or any part thereof, although often requested so to do, whereby an action hath accrued to the said plaintiff to demand and have of the said defendant the said sum of ——— dollars, with interest as aforesaid, and the costs aforesaid.</p> <p>And for this also, that the said defendant heretofore, to wit, on the ——— day of ———, 18—, was indebted to the said plaintiff in the further sum of ——— dollars, with lawful interest thereon, from the ——— day of ———, 18—, until paid, and ———</p>
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dollars, costs of award, upon and by virtue of a certain award, made by the said A. A., upon and by virtue of a certain submission before that time, made by the said plaintiff and the said defendant, mutually, to stand to and abide by the award, order, and determination of the said A. A. of and concerning all matters in difference then depending between the said plaintiff and defendant, and upon and by virtue of which said reference, the said A. A. had then awarded that the said defendant should pay to the said plaintiff, a certain sum of money, to wit, the said last mentioned sum of money, and being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, undertook and then faithfully agreed to pay the said plaintiff the said last mentioned sum of money, when the said defendant should be thereunto afterwards requested.

[Counts for money paid and an account stated in debt, may often be added with advantage.]

*Gen'l Breach.* Yet the said defendant has not as yet paid to the said plaintiff, although often requested so to do, the said sum of ——— dollars, first above demanded, or any part thereof; but to pay the same the said defendant has wholly failed and refused, and still doth fail and refuse, to the damage of the said plaintiff \$———. And therefore he brings his *suite*.

B. R. W., p. q.

### 131. *Declaration in Debt, on Guardian's Bond.*

(V. C. 1873, c. 123, § 5; Id. c. 12, § 6, 7; 1 Rob. Forms, 453.)

*Title of Court and Rules.* Circuit Court for A County, to-wit:

— Rules, 18—.

*Queritur.*

The Commonwealth of Virginia, which sues at the relation and for the benefit of W. W., complains of D. D., S. S., and H. H., of a plea that they render unto the said plaintiff the sum of ——— dollars, [the penalty of the bond,] which to the said plaintiff they owe, and from it unjustly detain: For this, to wit: that heretofore, to wit, on the ——— day of ———, in the year 18—, the said defendants, by their certain writing obligatory, dated on the

*Statement of Cause of Action.*

*Making Bond.*

day and year last aforesaid, sealed with their seals, an attested copy whereof is to the court now here shown, the original of the said writing obligatory being filed in the clerk's office of the ——— court for the ——— of ———, acknowledged themselves to be held and firmly bound unto the said plaintiff in the sum of ——— dollars above demanded, to be paid to the said plaintiff: To which said writing obligatory a condition was and is annexed, to the effect following, to wit: that whereas the said D. D. had by the ——— court of the ——— of ———, been appointed guardian of the said W. W., orphan of C. W., deceased, now if the said D. D. should faithfully discharge the duties of the said trust, and at the expiration thereof should deliver and pay all the estate and money in his hands, or with which he is chargeable by reason of such trust, to those entitled thereto, then the said writing obligatory should be

*Breach of Condition averred.* void, otherwise should remain in full force. And the said plaintiff in fact says that the said W. W. has attained to lawful age, and that

the said D. D. has not paid and delivered to the said W. W. all such estate and money in his hands, or with which he is chargeable by reason of the said trust, and which belongs to and is due to the said W. W., but the said D. D. has failed so to do in this, to wit, that an *ex-parte* settlement of the accounts of the said D. D., as guardian of the said W. W., was made in pursuance of the statute in that case made and provided, by and before M. G., the commissioner of accounts of the said — court of the — of —, and that the said D. D. was, on the — day of —, 18—, indebted to the said W. W. in the sum of — dollars, with lawful interest thereon, [or on — dollars, part thereof,] from the — day of —, 18—, until paid, which settlement was by the said commissioner of accounts duly reported to the said — court for the — of —, and by the said court, by its order, dated the — day of —, 18—, was approved and confirmed, and ordered to be recorded, as by the record still remaining in the said court more fully appears. And the said plaintiff avers that the said sum of — dollars, with interest as aforesaid, so due and in arrear to the said W. W., and every part thereof, is still in arrear and unpaid to the said W. W., although the said D. D. has been often requested to pay the same, but the said D. D. to pay the same has hitherto wholly failed and refused, and still fails and refuses, so to do. By reason of which breach of the said condition, the said writing obligatory became and was forfeited, and thereby an action has accrued to the said plaintiff to demand and have of and from the said defendants the said sum of — dollars, first above demanded.

*Breach.* Yet the said defendants, although often requested, have not, nor has either of them, as yet paid to the said plaintiff the said sum of — dollars first above demanded, or any part thereof, but the same to pay the said defendants have, and each of them hath, hitherto wholly failed and refused, and still do fail and refuse, to the damage of the said plaintiff \$—. And therefore the said plaintiff brings its *suite*.

*Conclusion.*

H. O. W., p. q.

132. *Declaration in Debt, for Rent.*

(Ante, p. 131; 1 Rob. Forms, 445; 2 Chit. Pl. 430.)

*Title of Court and Rules.* Circuit Court for A County, to wit: — Rules, 18—.

*Queritur.* O. C. complains of T. T., of a plea that he render unto the said plaintiff the sum of — dollars [the amount of rent alleged to be due, or if there are several counts, the aggregate of the sums claimed in them all,] which to him the said defendant owes, and from him unjustly detains: For this, to wit: that heretofore, to-wit, on the — day of —, in the year 18—, the said plaintiff demised to the said defendant a certain messuage and premises, with the appurtenances, to have and to hold the same to the said defendant for a certain term of years, to wit, for and during the term of — years then next ensuing, and fully to be complete and ended, yielding and paying therefor to the said plaintiff,

*Statement of Cause of Action.*

*1st Count.*

*Demise.*

*Rent.*

Entry of Tenant. during the said term, the yearly rent of ——— dollars in gold, on the first day of the months of ——— and ——— respectively, by even and equal portions. By virtue of which said demise the said defendant entered into the said demised premises with the appurtenances, and was possessed thereof from thenceforth, until and upon the ——— day of ———, 18—, when a large sum of money, to wit, the sum of ——— dollars, of the rent aforesaid for the space of ———, ending on the day and year last aforesaid, and then last elapsed, became and was due and payable from the said defendant to the said plaintiff, and still is in arrear and unpaid to the said plaintiff. Whereby an action hath accrued to the said plaintiff to demand and have of and from the said defendant the sum of ——— dollars first above demanded [*or if there are several counts, say—parcel of the sum above demanded.*]

Arrears of Rent.

Right of Action inferred.

2nd Count. And for this also, that the said defendant afterwards, &c., [*inserting an indebitatus count in debt, 2 Chit. Pl. 431, 385, 41.*]

Breach. Yet the said defendant, although often requested, hath not as yet paid to the said plaintiff the said sum of ——— dollars first above demanded, or any part thereof, but the same to pay hath hitherto wholly failed and refused, and still doth fail and refuse, to the damage of the said plaintiff \$——. And therefore he brings his *suit*.

Conclusion.

O. G. C., Jr., p. q.

## 133. Declaration in Debt, on Judgment.

(2 Chit. Pl. 482, 484.)

Title of Court and Rules. Circuit Court of A County, to wit: ——— Rules, 18—.

Queritur. C. C. complains of D. D., of a plea that he render unto the said plaintiff the sum of ——— dollars, which to him the said defendant owes, and from him unjustly detains: For this, to wit: that heretofore, to wit, on the ——— day of ———, in the year 18—, in the ——— court for the ——— of ———, the said plaintiff, by the consideration and judgment of the said court, recovered against the said defendant, the sum of ——— dollars above demanded, [*or, if the judgment were in an action of debt, say—"as well a certain debt of ——— dollars, as also ——— dollars,"*] which in and by the said court were adjudged to the said plaintiff for his damages which he had sustained, as well by reason of the non-performance by the said defendant of certain promises and undertakings then lately made by the said defendant to the said plaintiff, [*or, if the judgment were in debt, say—"by reason of the detention of the said debt,"*] as for his costs and charges by him about his suit in that behalf expended, whereof the said defendant was convict, as by the record and proceedings thereof remaining in the said court, more fully appears: which said judgment still remains in full force and effect, not reversed, satisfied, or otherwise vacated: Whereby an action hath accrued to the said plaintiff, to demand and have of and from the said defendant, the said sum of ——— dollars above demanded.

Judgment not Satisfied.

Right of Action inferred.

Breach. Yet the said defendant, although often requested, hath not as

yet paid to the said plaintiff the said sum of ——— dollars above demanded, or any part thereof, but the same to pay hath hitherto wholly failed and refused, and still doth fail and refuse, to the damage of the said plaintiff \$———. And therefore he brings his *suite*.

G. R. L. T., p. q.

134. *Declaration in Debt, on a Negotiable Note Protested.*  
*By Payee against Maker.*

(See 2 Chit. Pl. 388; Greening's Forms, 171.)

<i>Title of Court and Rules.</i>	Circuit Court for A County, to wit: ——— Rules, 18—.
<i>Queritur.</i>	C. C. complains of D. D. of a plea that he render unto the said plaintiff the sum of ——— dollars, [ <i>amount of note and costs of protest,</i> ] which to him the said defendant owes, and from him unjustly detains: For this, to wit, that heretofore, to wit, on the — day of — in the year of our Lord eighteen hundred and —, the said defendant made his certain note in writing, commonly called a negotiable note, the date whereof is the day and year aforesaid, and then delivered the same to the said plaintiff, whereby the said defendant promised and agreed — days, [or " <i>weeks</i> " or " <i>months</i> ," as the case may be,] after the date of the said note, (which period had elapsed before the commencement of this suit,) for value received to pay to the said plaintiff at [ <i>the place mentioned in the note, being a bank, savings bank, or licensed broker's office within the State.</i> V. C. 1873, c. 141, § 7], ——— dollars above demanded; and the said plaintiff avers that afterwards, to wit, on the — day of — in the year of our Lord eighteen hundred and —, when, according to the tenor and effect thereof and the usage and custom of merchants, the said note became due and payable, the same was presented and shown for payment at [ <i>the place mentioned in the note</i> ], but the said defendant did not, nor did any other person, pay the said sum of ——— dollars in the said note specified to the said plaintiff, or otherwise howsoever; whereupon the said note was afterwards, to wit, on the day and year last aforesaid, duly protested for non-payment thereof according to the said usage and custom of merchants, and thereby the said plaintiff was obliged to incur and did incur and pay for the protest of the said note and otherwise, charges to a great amount, to wit, to the amount of ——— dollars, which together with the said sum of ——— dollars, [ <i>the amount of the note,</i> ] make up the sum of ——— dollars above demanded; of all which said several premises the said defendant afterwards, to wit, on the — day of —, in the year of our Lord eighteen hundred and —, had notice. By means whereof, and by reason of the non-payment of the sum of ——— dollars above demanded, an action hath accrued to the said plaintiff to demand and have of and from the said defendant the said sum of ——— dollars above demanded, with lawful interest thereon from the — day of —, in the year of our Lord eighteen hundred and —, until payment.
<i>Statement of Cause of Action.</i>	
<i>Making of Note.</i>	
<i>Payable at Bank.</i>	
<i>Presentment.</i>	
<i>Default.</i>	
<i>Costs of Protest.</i>	
<i>Notice.</i>	
<i>Right of Action inferred.</i>	
<i>Breach.</i>	Yet the said defendant, although often requested, hath not as yet

paid to the said plaintiff the said sum of — dollars above demanded, or any part thereof, or of the interest thereon, as aforesaid; but the same to pay hath hitherto wholly refused, and still doth refuse, to the damage of the said plaintiff of \$—. And therefore he brings his *suite*.

W. C. B., p. q.

135. *Declaration in Debt, on Negotiable Note Protested.*

*By Indorsee against Maker and two Indorsers.*

(V. C. 1873, c. 141, § 7, 11.)

<b>Title of Court and Rules.</b>	Circuit Court for A County, to wit: — Rules, 18—.
<b>Queritur.</b>	C. C. complains of D. D., W. B., and T. T. of a plea that they render unto him the sum of — dollars, [ <i>amount of note, and costs of protest,</i> ] which to him they owe, and from him unjustly detain, for this, to wit: that heretofore, to wit, on the — day of —, in the year of our Lord eighteen hundred and —, the
<b>Statement of Cause of Action.</b>	
<b>Making Note.</b>	said D. D., according to the custom and usage of merchants, made his certain promissory note in writing, commonly called a negotiable note, the date whereof is the day and year aforesaid, and then delivered the same to the said W. B., whereby he promised and agreed — days [or " <i>weeks,</i> " or " <i>months,</i> " &c., as the case may be,] after the date thereof, (which period had elapsed before the commencement of this suit,) for value received, to pay to the said
<b>Payable at Bank, &amp;c.</b>	W. B., or his order, at [ <i>the place mentioned in the note, being a bank, savings bank, or a licensed broker's office,</i> V. C. 1873, c. 141, § 7, 11,] — dollars, parcel of the sum above demanded. And
<b>First Indorsement.</b>	the said plaintiff says that the said W. B., according to the custom and usage of merchants, afterwards, to wit, on the day and year last aforesaid, indorsed and delivered the said note, still being unpaid,
<b>Second Indorsement.</b>	to the said T. T., who, according to the same custom and usage of merchants, afterwards, to wit, on the day and year last aforesaid, indorsed and delivered the same, still being unpaid, to the said
<b>Presentment.</b>	plaintiff. And the said plaintiff avers that afterwards, to wit, on the — day of —, in the year of our Lord eighteen hundred and —, when, according to the tenor and effect thereof, and according to the custom and usage of merchants, the said note became due and payable, the same was presented and shown for payment at [ <i>the place mentioned in the note</i> ], but the said defendant did not,
<b>Default.</b>	nor did either of them, nor did any other person, then pay the sum of — dollars specified in the note; whereupon the said note
<b>Protest.</b>	was afterwards, to wit: on the day and year last aforesaid, duly protested for non-payment thereof, according to the custom and usage of merchants, and the said plaintiff was thereby obliged to
<b>Costs of Protest.</b>	incur, and did incur, and pay charges to a great amount, for the costs of the said protest, to wit, to the amount of — dollars, which, together with the said sum of — dollars, [ <i>the amount of the note,</i> ] make up the sum of — dollars above demanded; of all which said several premises the said defendant afterwards, to wit,
<b>Notice.</b>	on the day and year last aforesaid had notice. By means whereof, and by force of the statute in such case made and provided, and by



Reason of the non-payment of the said sum of — dollars above demanded, an action hath accrued to the said plaintiff to demand and have of and from the said defendant, the said sum of — dollars, above demanded, with lawful interest thereon, from the — day of —, in the year of our Lord eighteen hundred and —, until payment.

*Breach.* Yet the said defendants, although often requested, have not, nor hath either of them, as yet paid to the said plaintiff the said sum of — dollars above demanded, or any part thereof, or of the interest thereon as aforesaid, but the same to pay have hitherto wholly neglected and refused, and still do neglect and refuse, to the damage of the said plaintiff of \$——. And therefore he brings his *suite*.

J. S., p. q.

136. *Declaration in Debt, on Foreign Bill of Exchange Protested for Non-acceptance.*

*By Indorsee against Drawer and two Indorsers.*

(V. C. 1873, c. 141, § 9, 11.)

*Title of Court, and Rules.* Circuit Court for A County, to wit: — Rules, 18—.

*Queritur.* C. C. complains of D. D., W. B., and T. T., of a plea that they render unto him the sum of — dollars [*amount of bill, ten per cent. damages (or if drawn on any place out of Virginia within the United States, three per cent.), and costs of protest*; V. C. 1873, c. 141, § 9, 11], with interest on — dollars [*principal sum and costs of protest*; V. C. 1873, c. 141, § 11], part thereof, after the rate of — per centum per annum, from the — day of —, in the year of our Lord eighteen hundred and — [*when the bill is payable*], until payment, which to him the said defendants owe, and from him unjustly detain; For this, to wit: that heretofore, to wit, on the — day of —, in the year of our Lord eighteen hundred and —, the said D. D., according to the custom and usage of merchants, made his certain bill of exchange in writing, bearing date the day and year last aforesaid, and directed the said bill of exchange to A. A. (by the name and addition of Mr. A. A., Canton, China), by which said bill of exchange the said D. D. requested the said A. A. — days [or "*weeks*" or "*months*," &c.. as the case may be] after the date [or *after sight*] of that his the said D. D.'s *third* bill of exchange, *first and second* of the same tenor and date not paid, for value received to pay to the said W. B. [by the name and addition of Mr. W. B., of Richmond, Virginia, United States of America), or order, the sum of — dollars, parcel of the sum above demanded, and then delivered the said bill of exchange to the said W. B. And the said plaintiff says that the said W. B., according to the custom and usage of merchants, afterwards, to wit, on the day and year last aforesaid, before payment of the money specified in the said bill of exchange, indorsed and delivered the same to the said T. T., who, according to the same custom and usage of merchants, afterwards, to wit, on the day and

*Statement of Cause of Action.*

*Making Bill.*

*Tenor of Bill.*

*First Indorsement.*

*Second Indorsement.*

year last aforesaid, before payment of the money specified in the said bill of exchange, indorsed and delivered the same to the said plaintiff. And the said plaintiff avers that afterwards, before the time when, according to the tenor and effect of the said bill of exchange, the same was payable, the same being then unpaid, to wit, on the — day of —, in the year of our Lord eighteen hundred and —, in foreign parts beyond the limits of the United States, to wit, at Canton, in the empire of China, the said bill of exchange was presented and shown to the said A. A. for his acceptance thereof, according to the said usage and custom of merchants; but the said A. A. did not, nor would, when the said bill of exchange was so presented and shown for his acceptance as aforesaid, nor at any time before or afterwards accept the same, or pay the money in the said bill specified, or any part thereof, but wholly neglected and refused so to do, nor would he then, or at any other time, accept or pay the said first or second of exchange in the said bill of exchange mentioned, or either of them, but therein wholly failed and made default. Whereupon the said bill of exchange afterwards, to wit, on the — day of —, in the year of our Lord eighteen hundred and —, at Canton aforesaid, was duly protested for non-acceptance thereof, according to the custom and usage of merchants, and thereby the said plaintiff was obliged to incur, and did incur and pay charges to a large amount for the costs of the said protest, to wit, to the amount of — dollars, another parcel of the said sum of — dollars above demanded, of all which several premises the said defendants afterwards, to wit, on the day and year last aforesaid had notice. By reason whereof, and by force of the statute in such case made and provided, and by reason of the non-acceptance of the said bill of exchange as aforesaid, an action hath accrued to the said plaintiff to demand and have of the said defendants the said sum of — dollars [*amount of the bill*] together with the said sum of — dollars [*amount of costs of protest*] and the sum of — dollars, being damages, after the rate of *ten per centum* on the said principal sum of — dollars, which said three sums make up in the aggregate the said sum of — dollars above demanded; and also to demand and have interest on the said sum of — dollars, [*principal sum and costs of protest*,] part of the sum above demanded, after the rate of — *per centum per annum*, from the — day of —, in the year of our Lord eighteen hundred and —, [*when the bill is payable*,] until payment.

**Breach.** Yet the said defendants, although often requested, have not, nor hath either of them, as yet paid to the said plaintiff the said sum of — dollars above demanded, or any part thereof, or any part of the interest aforesaid, but the same to pay have, and each of them hath, wholly neglected and refused, and still neglect and refuse, to the damage of the said plaintiff \$—. And therefore he brings his *suite*.

**Conclusion.**

137. *Declaration in Debt, on Foreign Bill of Exchange Protested for Non-Payment.*

*By Indorsee against Acceptor.*

*Title of Court* Circuit Court for A County, to wit:

*and Rules.* — Rules, 18—.

*Queritur.*

C. C. complains of D. D. of a plea that he render unto the said plaintiff the sum of — dollars, [*amount of bill and ten per cent. damages, or if drawn on any place out of Virginia, within the United States, three per cent. and costs of protest*; V. C. 1873, c. 141, § 9, 11,] with interest on — dollars, [*principal sum and costs of protest, Id. 111,*] part thereof, after the rate of — per centum per annum, from the — day of —, in the year of our Lord eighteen hundred and —, [*when bill is payable,*] until payment, which to

*Statement of Cause of Action.*

*Drawing Bill.*

him defendant owes, and from him unjustly detains: For this, to-wit: that heretofore, to wit, on the — day of —, in the year of our Lord eighteen hundred and —, a certain J. S., according to the custom and usage of merchants, made his certain bill of exchange in writing, bearing date the day and year last aforesaid, and directed the said bill of exchange to the said defendant (by the name and addition of Mr. D. D., Montreal Canada,) by which said bill of exchange the said J. S. requested the said defendant — days [or "*weeks,*" or "*months,*" &c., as the case may be,] after the date [or "*after sight*"] of that his, the said J. S.'s, second bill of exchange, first and third of same tenor and date unpaid, for value received, to pay to one W. B. (by the name and addition of Mr. W. B., of Lynchburg, Va., United States of America,) or order, the sum of — dollars, parcel of the sum above demanded, and then delivered the said bill of exchange to the said W. B. And the said plaintiff avers that the said W. B. afterwards, to-wit, on the day and year last aforesaid, before the payment of the said sum of

*Indorsement.*

money in the said bill of exchange specified, endorsed and delivered the same to the said plaintiff, and that afterwards, to wit, before the time when, according to the tenor and effect of the said bill of exchange, the same was payable, the same being then unpaid, to-wit, on the — day of —, in the year of our Lord eighteen hundred and —, in foreign parts, beyond the limits of the United States, to wit, in Montreal, in the Dominion of Canada, the said defendant accepted the said second part of the said bill of exchange upon sight thereof, according to the custom and usage of merchants.

*Acceptance.*

And the said plaintiff says that afterwards, when the said bill of exchange became due and payable, according to the tenor and effect thereof, to wit, on the — day of —, in the year of our Lord eighteen hundred and —, the said bill of exchange so ac-

*Presentment for Payment.*

cepted and indorsed as aforesaid, was presented and shown to the said defendant for payment thereof, according to the tenor and effect of the said bill, and the said defendant's acceptance thereof, and according to the custom and usage of merchants, and the said defendant then had notice of the said indorsement so made thereon as aforesaid, and was then requested to pay the said sum of money in the said bill specified, according to the tenor and effect of the

said bill, of the said defendant's acceptance thereof, and of the said endorsement so made thereon as aforesaid, but the said defendant did not, or would at the said time when the said bill of exchange was so presented and shown to him for payment thereof as aforesaid, or at any time before or afterwards, pay the said sum of money in the said bill of exchange specified, or any part thereof, but wholly neglected and refused so to do; nor did he pay the said first and third of exchange in the said bill of exchange mentioned, or either of them, but therein wholly failed and made default; and thereupon afterward, to wit, on the day and year last aforesaid, at Montreal aforesaid, in the Dominion of Canada, the said bill of exchange was duly protested for non-payment thereof, according to the said usage and custom of merchants, and thereby the said plaintiff was obliged to incur, and did incur and pay, charges to a large amount for the costs of protest as aforesaid, to wit, to the amount of — dollars, parcel of the said sum of — dollars first above demanded; of all which said several premises the said defendant afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, had notice. By means whereof, and by reason of the non-payment of the bill of exchange as aforesaid, an action hath accrued to the said plaintiff to demand and have of the said defendant the said sum of — dollars [*the amount of the bill,*] together with the sum of — dollars [*costs of protest,*] and the sum of — dollars, being damages after the rate of *ten per centum* on the principal sum of — dollars, which said three sums make up in the aggregate the said sum of — dollars first above demanded, and also to demand of and from the said defendant interest after the rate of — per centum per annum on the sum of — dollars, [*the principal sum and costs of protest,*] part of the sum first above demanded, from the — day of —, in the year of our Lord eighteen hundred and —, [*when the bill is payable,*] until payment.

Yet the said defendant, although often requested, hath not as yet paid to the said plaintiff the said sum of — dollars first above demanded, or any part thereof, or any part of the interest aforesaid, but the same to pay hath hitherto wholly neglected and refused, and still doth neglect and refuse, to the damage of the said plaintiff of \$——. And thereupon he brings his *suite*.

J. P. C., p. q.

138. *Declaration in Debt, by Payee against Acceptor of Order.*

(1 Rob. Forms, 444; Sands' Forms, 473.)

*Title of Court and Rules.* Circuit Court for A County, to wit: — Rules, 18—.

*Queritur.* O. C. complains of D. D., of a plea that he render unto him the sum of — dollars, with interest thereon, after the rate of — per centum per annum, from the — day of —, 18—, until paid, which to him the said defendant owes, and from him unjustly detains: For this, to wit: that heretofore, to wit, on the — day of —, in the year 18—, a certain E. E., by a certain writing, signed with his proper name, did order the said defendant, for value received, to pay to the said plaintiff or order

*Statement of Cause of Action.*

*Making Order.*

the said sum of ——— dollars above demanded, with interest thereon, after the rate of — per centum per annum, from the ——— day of ———, 18—; and afterwards, to wit, on the ——— day of ———, 18—, the said order was presented and shown to the said defendant, who then, by indorsement thereon, signed with the said defendant's proper name, accepted the same, and thereby became liable to pay to the said plaintiff the said sum of ——— dollars above demanded, with interest thereon as aforesaid.

*Breach.* Yet the said defendant, although often requested, hath not as yet paid to the said plaintiff the said sum of ——— dollars above demanded, with interest thereon as aforesaid, or any part thereof, but the same to pay hath hitherto wholly failed and refused, and still doth fail and refuse so to do, to the damage of the said plaintiff \$ ———. And therefore he brings his *suite*.

*Conclusion.*

L. P. W., p. q.

139. *Declaration in Assumpsit, upon an Open Account.*

(2 Chit. Pl. 37, 89, &amp;c.)

*Title of Court and Rules.* Circuit Court for A County, to wit : — Rules, 18—.

*Queritur.* C. C. complains of D. D., of a plea of trespass on the case in assumpsit : For this, to wit : that heretofore, to wit, on the ——— day of ———, in the year of our Lord eighteen hundred and ———, the said defendant was indebted to the said plaintiff in the sum of ——— dollars, for goods, wares and merchandise before that time by the said plaintiff sold and delivered to the said defendant, and at his special instance and request ; and also in the further sum of ——— dollars, for the work and labor, care and diligence of the said plaintiff before that time done, performed and bestowed in and about the business of the said defendant, and for him, and at his special instance and request ; and also in the sum of ——— dollars, for money before that time lent and advanced to, and paid, laid out, and expended for the said defendant, and at his like special instance and request ; and also in the further sum of ——— dollars, for other money by the said defendant before that time had and received to and for the use of the said plaintiff ; and being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the day and year aforesaid, undertook and faithfully promised the said plaintiff to pay him the said several sums of money in this count mentioned, when the said defendant should be thereunto afterwards requested ;

*1st Count, Indeb. Assumpsit.* Work done.

*Money lent.* Money paid.

*Money had and received.* Consideration.

*Promise of defendant.* 2nd Count, Account Stated.

*Balance Ascertained.* Consideration.

*Promise.*

in this count last mentioned, when he, the said defendant, should be thereunto afterwards requested.

*Breach.*

Nevertheless the said defendant, not regarding his said several promises and undertakings, hath not as yet paid to the said plaintiff the said several sums of money, or any or either of them, or any part thereof, although often requested so to do: but to pay the same hath hitherto wholly neglected and refused, and still doth neglect and refuse, to the damage of the said plaintiff of

*Conclusion.* \$——. And therefore he brings his *suite*.

H. C. C., p. q.

#### 140. *Declaration in Assumpsit for Breach of Promise to Marry.*

(2 Chit. Pl. 322, &c.; 1 Rob. Forms, 520; Sands' Forms, 489.)

*Title of Court,* Circuit Court for A County, to wit:  
*and Rules.* — Rules, 18—.

*Queritur.*

*Statement of Cause of Action.*

*Mutual promises to Marry.*

*Pl't requests*

*Def't to marry*

*Breach.*

*Conclusion.*

C. C. complains of D. D., of a plea of trespass on the case in assumpsit: For this, to wit: that heretofore, to wit, on the — day of —, in the year 18—, in consideration that the said plaintiff, being then sole and unmarried, at the special instance and request of the said defendant, had then undertaken and faithfully promised the said defendant to marry him the said defendant, when the said plaintiff should be thereunto afterwards requested, the said defendant undertook, and then faithfully promised the said plaintiff to marry the said plaintiff, when he, the said defendant, should be thereunto afterwards requested. And the said plaintiff avers that she, confiding in the said promise and undertaking of the said defendant, hath always from thence hitherto continued, and still is sole and unmarried, and hath been during all the time aforesaid, and still is ready and willing to marry the said defendant, whereof the said defendant hath always had notice. And although the said plaintiff, after the making of the said promise and undertaking of the said defendant, to wit, on the day and year aforesaid, requested the said defendant to marry the said plaintiff, yet the said defendant, not regarding his said promise and undertaking, and contriving and intending to deceive and injure the said plaintiff in this behalf, did not, nor would, at the said time when he was so requested, nor at any other time before or afterwards, marry the said plaintiff, but hath hitherto wholly neglected and refused, and still doth neglect and refuse so to do, to the damage of the said plaintiff \$——. And therefore she brings her *suite*.

F. V., p. q.

#### 141. *Declaration in Assumpsit, upon a Warranty of Soundness of a Chattel.*

(2 Chit. Pl. 279; 1 Rob. Forms, 527.)

*Title of Court,* Circuit Court for A County, to-wit:  
*and Rules.* — Rules, 18—.

*Queritur.*

C. C. complains of D. D., of a plea of trespass on the case in

*Statement of Cause of Action.*      *assumpsit:* For this, to wit: that heretofore, to wit, on the — day of —, in the year 18—, in consideration that the said plaintiff, at the special instance and request of the said defendant, 1st Count. would buy of the said defendant a certain horse, at and for a certain price or sum of money, to wit, the sum of — dollars, to Consideration. be therefore paid by the said plaintiff, the said defendant undertook and then faithfully promised the said plaintiff that the said horse then was sound [*or free from vice, &c.*] And the said plaintiff avers that he, confiding in the said promise and undertaking of the said defendant, did afterwards, to wit, on the day and year aforesaid, buy the said horse of the said defendant, and then paid him Breach of warranty. for the same the said sum of money; nevertheless, the said defendant, contriving and intending to injure the said plaintiff in this behalf, did not regard his said promise and undertaking, but thereby did deceive and defraud the said plaintiff in this, to wit, that the said horse, at the time of the making of the said promise and undertaking of the said defendant, was not sound Not sound. [*or free from vice, &c.*], but on the contrary thereof, was at that time unsound, [*or subject to the vice of, &c.*], whereby the said horse became and was of no use or value to the said plaintiff; and the said plaintiff hath been put to great charges and expense of Charges incurred. his moneys in and about the feeding, keeping, and taking care of the said horse, in the whole amounting to a large sum of money, to wit, the sum of — dollars;

2nd Count,      And for this also, that afterwards, to wit, on the day and year Consideration. aforesaid, in consideration that the said plaintiff, at the like special instance and request of the said defendant, had then bought of the said defendant a certain other horse, at and for a certain other price or sum of money, then agreed upon between the said plaintiff and the said defendant, the said defendant undertook, and then faithfully promised the said plaintiff, that the said last mentioned horse, at the time of the said sale thereof, was sound, Def't's Promise. [*or free from vice*]; nevertheless, the said defendant, contriving and intending to injure the said plaintiff, did not regard his said Breach of warranty. last mentioned promise or undertaking, but thereby deceived and defrauded him in this, to wit, that the said last mentioned horse, at the time of the said sale thereof, was not sound [*or free from vice*], whereby the said last mentioned horse became and was of no use or value to the said plaintiff; and the said plaintiff hath been put to great charges and expense of his moneys in and about the feeding, keeping, and taking care of the said horse, in the whole amounting to a large sum of money, to wit, the sum of — dollars.

*Breach.*      Wherefore the said plaintiff says, that by reason of the matters in the above two counts of this declaration set forth, he is injured and hath sustained damage to the amount of \$——. And therefore he brings his *suite*.

*Conclusion.*

142. *Declaration in Assumpsit, on a Guaranty.*

(2 Chit. Pl. 314.)

*Title of Court,* Circuit Court for A County, to wit :  
*and Rules.* — Rules, 18—.

*Queritur.* C. C. complains of D. D. of a plea of trespass on the case in assumpsit: For this, to wit: that heretofore, to wit, on the — day of —, in the year 18—, in consideration that the said plaintiff, at the special instance and request of the said defendant, would sell and deliver to one M. M., on credit, all such goods as the said M.

*Consideration.* M. should have occasion for and require of the said plaintiff in the way of his trade and business as a hardware merchant, [or *whatever else may be the terms of the guaranty in the particular case,*] the said defendant undertook and then faithfully promised the said plaintiff to be accountable to the said plaintiff for whatever goods the said plaintiff should sell and deliver to the said M. M. as aforesaid, [or *whatever was the undertaking of the guarantor.*] And the

*Defendant's Promise.* said plaintiff avers that he, confiding in the said promise and undertaking of the said defendant, did afterwards, to wit, on the day and year aforesaid, sell and deliver to the said M. M., on a certain credit then agreed upon between the said plaintiff and M. M., certain goods of great value, which the said M. M. then had occasion for and required of the said plaintiff in the way of his trade and business, and at and for certain reasonable prices then agreed upon by and between the said plaintiff and the said M. M. [or *if no stipulated price, say, at and for certain reasonable sums of money, amounting, &c.,*], amounting to a large sum of money, to wit, to the sum of — dollars [averring the plaintiff's performance of the consideration, whatever it may be], and that although the said credit and the time for the payment of the price of the said goods, by the said M. M. to the said plaintiff hath long since elapsed, yet the said M. M., although he was afterwards, to wit, on the day and year last aforesaid, requested by the plaintiff so to do, hath not as yet paid to him the said sum of — dollars, or any part thereof, but hath hitherto wholly failed and refused so to do, of all which said premises the said defendant afterwards, to wit, on the day and year last aforesaid, had notice; Yet the said defendant, not regarding his said promise and undertaking, but contriving and intending to deceive and defraud the said plaintiff in this behalf, hath not as yet accounted to the said plaintiff, or paid the said sum of money, or any part thereof, for the said goods, or any part thereof, although the said defendant afterwards, to wit, on the day and year last aforesaid, was by the said plaintiff requested so to do, and hath hitherto wholly neglected and refused, and still wholly neglects and refuses so to do, and the said sum of — dollars still remains wholly due and unpaid to the said plaintiff.

*Credit.*

*Default.*

*Breach.*

*Conclusion.* Wherefore the said plaintiff says that, by reason of the premises, he is injured, and hath sustained damage to the amount of \$—. And therefore he brings his *suite*.

R. K. B., p. q.



143. *Declaration in Assumpsit, against a Purchaser for Loss in Re-sale.*

(2 Chit. Pl. 267 ; 1 Rob. Forms, 524.)

*Title of Court and Rules.* Circuit Court for A County.  
— Rules, 18—.

*Queritur.* C. C. complains of D. D., of a plea of trespass on the case in  
*Statement of Cause of Action.* assumpsit ; For this, to wit : that heretofore, to wit, on the — day of —, 18—, the said plaintiff put up and exposed, by public auction, in lots, amongst other things, a large quantity of goods, to wit, —, then lying and being in a certain warehouse, situate and being at —, [*as in the particulars of sale,*] under and subject to the following conditions of sale, that is to say, that the highest bidder, &c. [*set out the conditions of sale*]. As by the said conditions of sale, reference being thereunto had, will, amongst other things, more fully appear. of all which said premises the said defendant, before and at the time when the said goods were so put up and exposed to sale as aforesaid, to wit, on the day and year aforesaid, had notice ; and thereupon afterwards, to wit, on the day and year first aforesaid, in consideration of the premises, and also in consideration that the said plaintiff, at the special instance and request of the said defendant, had undertaken and faithfully promised the said defendant to perform and fulfil the said agreement and stipulations on the said plaintiff's part and behalf to be performed and fulfilled ; he, the said defendant, undertook and then faithfully promised the said plaintiff to perform and fulfil the said agreement in all things, on the said defendant's part to be performed and fulfilled. And the said plaintiff in fact saith, that afterwards, to wit, on the day and year first aforesaid, the said defendant became and was the highest bidder for, and declared the buyer of a certain lot of goods, called lot —, parcel of the said goods so put up and exposed to sale, under and subject to the conditions aforesaid, consisting of divers —, at and for a certain sum of money, to wit, the sum of — dollars, then bid by the said defendant for the same. And although the said defendant, in pursuance of the said conditions of sale, ought to have cleared away and paid for the said lot or parcel of the said goods, within the space of one month from the said sale ; and although the said defendant did, during the space of one month, to wit, on the — day of —, 18—, clear away and pay for a part of the said lot of goods, yet the said plaintiff avers that the said defendant, although often requested, did not, nor would, at any time during the space of one month, or at the expiration thereof, clear away or pay for the residue of the said lot of goods, or any part thereof, according to the said conditions of sale, and his said promise and undertaking so by him in manner and form aforesaid made ; but on the contrary thereof, the said defendant permitted the residue of the said lot of goods to remain uncleared, without paying for the same at and after the expiration of the said space of one month, being the time above limited for clearing away the same, and thereupon afterwards, and after the expiration of the said space of one month, and whilst the residue of the said lot of goods remained uncleared

and unpaid for as aforesaid, to wit, on the — day of —, 18—, the said plaintiff, according to the said conditions of sale, and in pursuance thereof, did re-sell the residue of the said lot of goods, so remaining uncleared and unpaid for as aforesaid, that is to say, by public sale to the highest bidder, at and for certain sums of money, amounting in the whole to a much less sum of money, to wit, the sum of — dollars less than the amount of the said sum of money so as aforesaid bid by the said defendant for the same, and thereby there was a deficiency upon such re-sale to a large amount, to wit, to the amount of the said sum of — dollars, over and besides the charges attending such re-sale, amounting to a certain other sum of money, to wit, the sum of — dollars, and making together, with the said sum of — dollars, the sum of — dollars; of all which said several premises the said defendant afterwards, to wit, on the day and year last aforesaid, had notice, and was then requested by the said plaintiff to pay him the said sum of — dollars, according to the said conditions of sale, and his said promise and undertaking as aforesaid.

**Breach.** Yet the said defendant, although often requested, hath not as yet paid to the said plaintiff the said last-mentioned sum of — dollars, or any part thereof, but the same to pay has hitherto wholly failed and refused, and still doth fail and refuse, to the damage of the said plaintiff \$ —. And therefore he brings his *suite*.

**Conclusion.**

F. D. B., p. q.

144. *Declaration in Assumpsit, upon a Writing Promising to Pay a sum in Bank Notes.*

(Sands' Forms, 488; 1 Rob. Forms, 509.)

**Title of Court and Rules.** Circuit Court of A County, to wit: — Rules, 18—.

**Queritur.** C. C. complains of D. D., of a plea of trespass on the case in assumpsit: For this, to wit: that heretofore, to wit, on the — day of —, in the year —, the said defendant was indebted to the said plaintiff in the sum of — dollars, for divers goods, wares and merchandize before that time by the said plaintiff sold and delivered to the said defendant, and at his special instance and request, and being so indebted, the said defendant, in consideration thereof, then made his certain writing, signed by him with his name, the date whereof is the day and year aforesaid, and then delivered the same to the said plaintiff, by which said writing the said defendant promised to pay to the said plaintiff, for value received, six months after the date thereof, the said sum of — dollars, in notes of the First National Bank of Richmond, in Virginia; by means whereof the said defendant became and was liable to deliver to the said plaintiff, six months after the date of the said writing, so many notes of the said First National Bank of Richmond, as would nominally amount to — dollars. And the said plaintiff avers that the said defendant did not, six months after the date of the said writing, and according to the tenor and

**Consideration.**

**Promise of Defendant.**

**Default of Defendant.**

effect thereof, deliver to him so many notes of the said First National Bank of Richmond as would nominally amount to ——— dollars, nor any part thereof, but therein wholly failed and made default; nor has the said defendant, at any time since, delivered such notes, or any part thereof, to the said plaintiff. And the said plaintiff further says that the said notes of the said First National Bank of Richmond, which ought to have been delivered to him by the said defendant, according to the said tenor and effect of the said writing, were at the time when the same ought to have been so delivered, as aforesaid, and are now, of great value, to wit, of the value of ——— dollars, of which the said defendant afterwards, to wit, on the ——— day of ———, 18—, [*the expiration of the six months, when the delivery should have been made,*] had notice. Yet the said defendant, although often requested by the said plaintiff, hath not as yet paid to the said plaintiff the value as aforesaid for the said notes, being the said sum of ——— dollars, nor any part thereof.

*Value.*

*Breach.*

*Conclusion.* By means of all which premises the said plaintiff is injured, and hath sustained damage to the amount of \$———. And therefore he brings his *suite*.

W. R. B., p. q.

145. *Declaration in Assumpsit, for not Accepting Goods Sold.*

*Title of Court and Rules.* Circuit Court for A County, to wit: ——— Rules, 18—.

*Queritur.* C. C. complains of D. D., of a plea of trespass on the case in assumpsit: For this, to wit: that heretofore, to wit, on the ——— day of ———, in the year of our Lord eighteen hundred and ———, the said defendant bargained for and bought of the said plaintiff, and the said plaintiff, at the special instance and request of the said defendant, then and there sold to the said defendant a large quantity of goods and chattels, to wit, ——— barrels of best family flour, at the rate and price of ——— dollars for each and every barrel thereof, to be delivered by the said plaintiff to the said defendant forthwith, [or "*within ——— days then next following,*" &c., as the case may be] at ———, in the county (or city) of ———, and to be paid by the said defendant to the said plaintiff, on the delivery thereof as aforesaid, [or "*——— days after the delivery thereof as aforesaid,*" &c., as the case may be;] and in consideration thereof, and that the said plaintiff at the special instance and request of the said defendant, had then and there undertaken and faithfully promised the said defendant to deliver the said goods and chattels to the said defendant at the time and place aforesaid, the said defendant undertook, and then and there faithfully promised the said plaintiff to accept the said goods and chattels of and from the said plaintiff, and to pay for the same the price aforesaid on the delivery thereof, [or "*——— days after the delivery thereof*" or, &c., as the case may be,] to him the said defendant as aforesaid. And although the said plaintiff afterwards and forthwith, [or "*within ———*

- Plaintiff's readiness to perform.**      *days then next following," according to the stipulation,] after the making of the said promise and undertaking of the said defendant, to wit, on the — day of —, in the year of our Lord eighteen hundred and —, at the county (or city) of — aforesaid, was ready and willing, and then and there tendered and offered to deliver the said goods and chattels, that is to say, — barrels of best family flour, to the said defendant, and then and there requested the said defendant to accept the same, and to pay him for the same as aforesaid the price aforesaid; [If the price is not to be paid on delivery, this last averment should be omitted.]*
- Breach by Defendant.**      Yet the said defendant, not regarding his said promise and undertaking, but contriving and craftily intending to deceive and defraud the said plaintiff in this behalf, did not, nor would at the said time when he was requested as aforesaid, or at any time before or afterwards, accept the said flour, or any part thereof, of and from the said plaintiff, or pay him for the same as aforesaid, (*if the price is not to be paid on delivery, omit this last averment,*) but then and there wholly neglected and refused so to do;
- 2nd Count, Contract of sale.**      And for this also, that heretofore, to wit, on the — day of —, in the year of our Lord eighteen hundred and —, in consideration that the said plaintiff, at the special instance and request of the said defendant, would sell him, the said defendant, certain goods and chattels, to wit, — barrels of best family flour, at and for a certain price, to wit, the sum of — dollars, for each and every barrel thereof, [*or if no price is named, say "at and for a reasonable price for the same,"*] and would deliver the said flour forthwith, [*or according to the terms of the stipulation,*] the said defendant undertook and then faithfully promised the said plaintiff to accept the said goods and chattels of and from the said plaintiff, and to pay for the same the price aforesaid [*according to the stipulation.*] And the said plaintiff avers that he, confiding in the said promise and undertaking of the said defendant, afterwards, to wit, on the day and year aforesaid, was ready and willing, and then and there offered to deliver the said flour to the said defendant, and then and there requested him to accept the same, of all which said premises the said defendant then had notice.
- Plaintiff's readiness to perform.**      Yet the said defendant, not regarding his said promise and undertaking, but contriving and intending to injure the said plaintiff in this behalf, did not, nor would then or at any other time, accept the said flour of the said plaintiff, or pay him the said price therefor, or any part thereof, [*according to the stipulation,*] but so to do the said defendant hath hitherto wholly neglected and refused, and still doth neglect and refuse.
- Breach by Defendant.**      Wherefore, the said plaintiff says that he hath sustained damage, by reason of the said several breaches of the said several promises and undertakings in the said several counts in this declaration above mentioned, to the amount of \$—. And thereupon he brings his *suite*.
- Gen'l Breach.**      Wherefore, the said plaintiff says that he hath sustained damage, by reason of the said several breaches of the said several promises and undertakings in the said several counts in this declaration above mentioned, to the amount of \$—. And thereupon he brings his *suite*.
- Conclusion.**      Wherefore, the said plaintiff says that he hath sustained damage, by reason of the said several breaches of the said several promises and undertakings in the said several counts in this declaration above mentioned, to the amount of \$—. And thereupon he brings his *suite*.

146. *Declaration in Assumpsit, by Assignee against Assignor of Note, when Maker is Notoriously Insolvent.*

(4 Rob. Prac. 425.)

*Title of Court* Circuit Court for A County, to wit:  
*and Rules.* — Rules, 18—.

*Queritur.*

*Statement of Cause of Action.*

*Making Note.*

*Assignment of Note.*

*Notorious Insolvency of Debtor.*

*Continued Insolvency of Debtor, and failure to pay.*

*Breach.*

*Conclusion.*

C. C. complains of D. D., of a plea of trespass on the case in assumpsit; For this, to wit: that heretofore, to wit, on the — day of —, in the year of our Lord eighteen hundred and —, one J. S. made his certain note in writing, commonly called a promissory note, the date whereof is the day and year aforesaid, and thereby promised to pay to the said D. D., — months after the date of the said note, — dollars for value received. And the said plaintiff says that the said sum of money in the said note specified was not paid at the time appointed therein for payment, or at any other time before or since, but that the same is still in arrear and unpaid. And the said plaintiff further says, that afterwards, to wit, on the — day of —, in the year of our Lord eighteen hundred and —, the said D. D. did, by an indorsement in writing on the said promissory note, signed with his name, the said promissory note being then unpaid, for value received, assign the same to the said plaintiff. And the said plaintiff avers that immediately after the said assignment of the said promissory note, and before the said plaintiff could commence any suit thereon, the said J. S. became, and was totally and notoriously insolvent, and unable to pay the said sum of money in the said note specified, or any part thereof; and that ever since the said J. S. hath been and is now totally and notoriously insolvent, and unable to pay the said sum in the said note specified, or any part thereof, and never did pay the same; of all which said premises, the said D. D. afterward, to wit, on the — day of —, in the year of our Lord eighteen hundred and —, had notice. By reason whereof the said D. D. became liable to pay to the said plaintiff the said sum of — dollars, the amount in the said note specified, with interest thereon after the rate of — per centum per annum, from the — day of —, in the year of our Lord eighteen hundred and —, until payment. And being so liable, the said D. D., in consideration thereof, afterwards, to wit, on the — day of —, in the year of our Lord eighteen hundred and —, undertook and promised the said plaintiff that he would pay him the said sum of — dollars, with interest thereon as aforesaid, whenever the said defendant should be thereunto afterwards requested.

Nevertheless, the said defendant, not regarding his promise and undertaking, and contriving and intending to deceive and defraud the said plaintiff in this behalf, hath not as yet paid to the said plaintiff the said sum of — with interest thereon as aforesaid, or any part thereof, but the same to pay hath hitherto wholly neglected and refused, and still doth neglect and refuse, to the damage of the said plaintiff of — dollars. And therefore he brings his *suit*.

T. P. C., p. q.

147. *Declaration in Assumpsit, by Assignee against Assignor of Bond, after Judgment against Obligor and Return of "No Effects."*  
(4 Rob. Prac. 423.)

*Title of Court and Rules.* Circuit Court for A County, to wit: — Rules, 18—.

*Queritur.*

*Statement of Cause of Action.*

*Making Bond.*

*Assignment of Bond.*

*Suit instituted on Bond.*

*Judgment recovered.*

*Execution of fieri facias issued.*

*Return on fi. fa.*

*Liability of Defendant inferred.*

*Promise.*

C. C. complains of D. D., of a plea of trespass on the case in assumpsit; For this, to wit: that heretofore, to wit, on the — day of —, in the year of our Lord eighteen hundred and —, one J. S. made his certain writing obligatory, sealed with his seal, the date whereof is the day and year aforesaid, and then delivered the same to the said defendant, and thereby bound himself to pay to the defendant whenever he should be thereunto requested afterwards, the sum of — dollars, [*the principal*], and to the said payment bound himself in the penal sum of — dollars, [*the penalty*], and the said defendant, afterwards and before the payment of the said sum of — dollars, [*principal*] specified in the said bond, or of any part thereof, to wit, on the — day of —, in the year of our Lord eighteen hundred and —, by an indorsement in writing on the said bond, signed by him with his name, assigned the said bond to the said plaintiff for value received. And the said plaintiff avers that afterwards, to wit, on the — day of —, in the year of our Lord eighteen hundred and —, he instituted and prosecuted an action of debt in the circuit court for — county, on the said bond against the said J. S., and recovered judgment in the said court against the said J. S. for the sum of — dollars, [*the penalty*] to be discharged by the payment of — dollars, [*the principal*], with interest thereon after the rate of — per centum per annum, from the — day of —, in the year of our Lord eighteen hundred and — until payment, and the costs, which amounted to — dollars; and that to satisfy the said judgment a writ of *fi. facias* was issued afterwards, to wit, on the — day of —, in the year of our Lord eighteen hundred and —, directed to the sheriff of — county, commanding him to make out of the goods and chattels of the said J. S. the amount of the said judgment, with the costs aforesaid, to render to the said plaintiff, on which said writ of *fi. facias* the sheriff of the said county of — returned that he could find no effects whereof to make the amount of the said *fi. facias*, as by the record and proceedings thereof in the said court remaining appears; of all which said premises the said defendant afterwards, to wit, on the — day of —, in the year of our Lord eighteen hundred and —, had notice. By reason whereof the said defendant became and was liable to pay to the said plaintiff the said sum of — dollars [*the principal*], with interest thereon and costs as aforesaid; and the said defendant, in consideration thereof, being so liable, afterwards, to wit, on the — day of —, in the year of our Lord eighteen hundred and —, undertook and then faithfully promised the said plaintiff to pay him the sum of — dollars, last aforesaid, with the interest thereon and the costs aforesaid, when he should be thereunto afterwards requested.

*Breach.* Nevertheless, the said defendant, although often requested, hath not as yet paid to the said plaintiff the said sum of — dollars, [the principal,] with interest thereon, and costs aforesaid, or any part thereof, but the same to pay hath hitherto wholly refused, and

*Conclusion.* still doth neglect and refuse, to the damage of the plaintiff of \$—. And therefore he brings his *suite*.

B. T. C., p. q.

148. *Declaration in Assumpsit, by Assignee against Assignor, for Bond paid by Assignee.*

(4 Rob. Pract. 425.)

*Title of Court and Rules.* Circuit Court for A County, to wit: — Rules, 18—.

*Queritur.* C. C. complains of D. D., of a plea of trespass on the case in

*Statement of Cause of Action.* assumpsit: For this, to wit: that heretofore, to wit, on the — day of —, in the year of our Lord —, one J. S. made his certain writing obligatory, sealed with his seal, the date whereof is

*Making Bond.* the day and year aforesaid, and thereby bound himself to pay to the said defendant the sum of — dollars, whenever the said J. S. should be thereunto afterwards requested. And the said defendant, after the making of the said writing obligatory, to wit, on the — day of —, in the year of our Lord eighteen hundred and —, for value received, by an indorsement thereon in writing, subscribed by him with his name, assigned the said writing obligatory to the said plaintiff, the same being then wholly unpaid.

*1st Assign't.* And the said plaintiff says, that afterwards, to wit, on the day and year last aforesaid, the said plaintiff, by an indorsement thereon in writing, subscribed by him with his name, for value received, assigned the said writing obligatory to one W. B., the same being wholly unpaid. And the said plaintiff says, that the said writing obligatory, when the same became due and payable, according to the tenor and effect thereof, was not paid, nor was it paid at any time before or since, but is still in arrear and unpaid; and that after the same became so due and payable, the said W. B. instituted and prosecuted in the circuit court of — county, an action of debt on the said writing obligatory, against the said J. S., to recover the said sum of — dollars specified therein, and on the

*Action instituted.* — day of —, in the year of our Lord eighteen hundred and —, recovered a judgment in the said court, against the said J. S. for the said sum of — dollars, the amount of the said writing obligatory, with interest thereon, after the rate of — per centum per annum, from the — day of —, in the year of our Lord eighteen hundred and —, until paid, and — dollars, the costs by the said W. B. about his suit expended, as by the transcript of the record, and proceedings in that suit will appear. And the plaintiff further says, that upon the said judgment afterwards, to wit, on the — day of —, in the year of our Lord eighteen hundred and —, the said W. B. caused to be issued from the clerk's office of the said court, a writ of *feri facias*, to the sheriff of — county directed, commanding him to make of the goods and chattels of the said J. S. within his bailiwick the said sum of —

*Judgment.*

*Fieri Facias issued.*

dollars, with interest thereon, as aforesaid, and also the costs aforesaid, to render to the plaintiff; on which said writ of *fiery facias* the sheriff of the said county of — returned that he could find no effects whereof to make the amount of the said writ of *fiery facias*, as by the record and proceedings in the said court remaining appears; of all which said premises the said defendant afterwards, to wit, on the — day of —, in the year of our Lord eighteen hundred and —, had notice. By reason whereof the said plaintiff became liable to pay to the said W. B. the sum of money specified in the said writing obligatory, with interest thereon, as aforesaid, and the costs aforesaid. And being so liable, the said plaintiff, in consideration thereof, afterwards, to wit, on the — day of —, in the year of our Lord eighteen hundred and to 2d Indor'r. —, paid the same to the said W. B., and the said defendant was then liable to pay the same to the said plaintiff; and being so liable, Def't inferred the said defendant afterwards, to wit, on the day and year last to Plaintiff. aforesaid, undertook and faithfully promised the said plaintiff to Promise to pay him the same when he, the said defendant, should be thereunto afterwards requested.

*Breach.* Nevertheless, the said defendant, although often requested, has not paid to the said plaintiff the said sum of — dollars, with interest thereon as aforesaid, and the costs aforesaid, or any part thereof, but to pay the same the said defendant has hitherto wholly neglected and refused, and still doth neglect and refuse, to the damage of the said plaintiff of \$—. And therefore he brings his *suite*.

*Conclusion.*

R. H. E., p. q.

#### 149. Declaration in Assumpsit, against a Common Carrier for loss of Goods.

(2 Chit. Pl. 356; 1 Rob. Forms, 522.)

*Title of Court and Rules.* Circuit court for A county, to wit: — Rules 18 —.

*Queritur.* C. C. complains of D. D., of a plea of trespass on the case in assumpsit: For this, to wit: that heretofore, to wit, on the — day of —, in the year of our Lord eighteen hundred and —, the said defendant was a common carrier of goods and chattels for hire in and by a certain wagon [or "coach," or "train of railway cars," &c.] from a certain place, to wit, from —, to a certain other place, to wit, to —. And the said defendant, being such carrier as aforesaid, the said plaintiff heretofore, to wit, on the day and year first aforesaid, at the special instance and request of the said defendant caused to be delivered to the said defendant, so being such carrier as aforesaid, certain goods and chattels, to wit, &c., [describe them as in *trover*, 2 Chit. Pl. 835], of the said plaintiff, of great value, to wit, of the value of — dollars, to be taken care of and safely and securely carried and conveyed by the said defendant as such carrier as aforesaid, in and by the said wagon [or "coach," or "train of railway cars," &c.] from — aforesaid, to — aforesaid, and there, to wit, at —, the place last men-



tioned, to be safely and securely delivered by the said defendant for the said plaintiff; and in consideration thereof, and of certain reward to the said defendant in that behalf, he, the said defendant, being such carrier as aforesaid, then, to wit, on the day and year first aforesaid, undertook and faithfully promised the said plaintiff to take care of the said goods and chattels, and safely and securely, to carry and convey the same in and by the said wagon [or "*coach*," or "*train of railway cars*," &c.] from ——— aforesaid, to ——— aforesaid, and there, to wit, at ———, the place last mentioned, safely and securely to deliver the same for the said plaintiff. And although the said defendant, as such carrier as aforesaid, then had and received the said goods and chattels, for the purpose aforesaid, yet the said defendant, not regarding his duty as such carrier, nor his said promise and undertaking so made as aforesaid, but contriving and intending to deceive and injure the said plaintiff in this behalf, hath not taken care of the said goods and chattels, or safely or securely carried or conveyed the same from ——— to ——— aforesaid, nor hath there, to wit, at ———, the last named place, safely or securely delivered the same for the said plaintiff; but on the contrary thereof, he, the said defendant, being such common carrier as aforesaid, so carelessly and negligently behaved and conducted himself with respect to the said goods and chattels, that by and through the mere carelessness, negligence and improper conduct of the said defendant and his servants in this behalf, the said goods and chattels, being of the value aforesaid, afterwards, to wit, on the day and year aforesaid, became and were wholly lost to the said plaintiff.

2nd Count, For And for this also, that afterwards, to wit, on the ——— day of not carrying ———, in the year of our Lord eighteen hundred and ———, in in reasonable consideration that the said plaintiff, at the special instance and request of the said defendant, had then and there caused to be delivered to the said defendant divers other goods and chattels, to wit, goods and chattels of the like number, quantity, quality, description, and value, as those in the first count of this declaration mentioned, of the said plaintiff, to be taken care of and safely and securely conveyed and carried by the said defendant, being such carrier as aforesaid, to ——— aforesaid, and there, to wit, at ———, the place last mentioned, to be delivered by the said defendant for the said plaintiff, for certain reward to the said defendant in that behalf, he, the said defendant, undertook and then and there faithfully promised the said plaintiff to take care of the said last mentioned goods and chattels and safely and securely to carry and convey the same to ——— aforesaid, and there, to wit, at ———, the place last mentioned, to deliver the same for the said plaintiff, in a reasonable time then next following. And although the said defendant then had and received the said last mentioned goods and chattels for the purpose aforesaid, and although a reasonable time for the carriage, conveyance and delivery thereof as aforesaid, hath long since elapsed, yet the said defendant, not regarding his said last mentioned promise and undertaking, but contriving and intending to deceive and injure the said plaintiff in this behalf, did not, nor would, within such reasonable time as aforesaid, or

at any time afterwards, although often requested so to do, safely or securely carry and convey the last said mentioned goods and chattels to —, nor there, to wit, at —, the place last mentioned, deliver the same for the said plaintiff, but hath hitherto wholly neglected and refused to do so, whereby the said last mentioned goods and chattels, being of the value aforesaid, have been and are wholly lost to the said plaintiff.

**3rd Count,**  
**For not taking wit,** on the — day of —, in the year of our Lord eighteen hundred and —, in consideration that he, at his own special instance and request, then had the care and custody of divers other goods and chattels of the said plaintiff of the like number, quantity, quality, description and value, as those in the first count of this declaration mentioned, he, the said defendant, undertook and then and there faithfully promised the said plaintiff to take due and proper care thereof, whilst the said defendant so had the care and custody of the same; yet the said defendant, not regarding his said promise and undertaking, but contriving and intending to injure and deceive the said plaintiff in this behalf, whilst the said defendant so had the care and custody of the said goods and chattels, took so little and such bad and improper care thereof, that the same afterwards, to wit, on the day and year aforesaid, became and were greatly damaged, and injured, and wholly lost to the said plaintiff.

**Breach.**

Nevertheless the said defendant, not regarding his said several promises and undertakings, hath not kept, performed or fulfilled the same, although often requested so to do, but hath broken the same as aforesaid, to the damage of the said plaintiff \$——. And therefore he brings his *suite*.

T. E., p. q.

150. *Declaration in Assumpsit, upon a Policy of Insurance against Fire under Virginia Statute.*

(V. C. 1873, c. 167, § 14; 2 Chit. Pl. 208, 536.)

**Title of Court** Circuit Court for A County, to wit:  
**and Rules.** — Rules, 18—.

**Queritur.**

**Statement of**

**Cause of**

**Action.**

**Making of**

**Policy.**

**Tenor of**

**Policy.**

C. C. complains of the E. F. I. Company, of a plea of trespass on the case in assumpsit; For this, to wit: that heretofore, to wit, on the — day of —, in the year of our Lord eighteen hundred and —, the said defendant caused to be made a certain policy of assurance in writing, purporting thereby, and containing therein, that in consideration of — dollars, to it paid by the said plaintiff, the receipt whereof the said defendant thereby acknowledged, the said defendant undertook and promised the said plaintiff that it, the said defendant, would insure the said plaintiff against loss or damage by fire to the amount of — dollars, and would make good unto the said plaintiff any such loss or damage as should happen by fire, not exceeding the said last named amount of — dollars, for the term of one year from the — day of —, 18—, at twelve o'clock noon, until the — day of —, 18—, at twelve o'clock noon, on certain premises then and ever since the property of the

said plaintiff, in the said policy described as one, &c. [*as in the policy*]; the said loss or damage to be estimated according to the actual cash value of the said property at the time the same shall happen, and to be paid by the said defendant within sixty days after due notice and proof thereof, made by the said plaintiff, in conformity to the conditions of the said policy, should have been received at the office of the said defendant, unless the said defendant should have given notice of its intention to rebuild or repair the damaged premises; and in the said policy sundry provisos, conditions, prohibitions, and stipulations were and are contained and thereto annexed, as by the original policy [*or a sworn copy of the said original policy*], which is filed herewith, will more fully and at large appear.

**Notice and proof of Loss Required.** And the said plaintiff says, that before and at the time of making the said policy of assurance by the said defendant, and at all times since, and now, the said plaintiff was and is interested in the said insured premises in the said policy mentioned and described as aforesaid, to a large amount, to wit, the amount of ——— dollars, and the said dwelling house, &c. [*describing the house or houses insured*], in the said policy mentioned, afterwards and between the ——— day of ———, 18—, at twelve o'clock noon, and the ——— day of ———, 18— at twelve o'clock noon, to wit, on the ——— day of ———, 18—, was burned down, and consumed and destroyed by fire, and damage and loss were thereby occasioned to the said plaintiff to the amount of ——— dollars, in such manner and under such circumstances as to come within the stipulation, promise and undertaking aforesaid of the said defendant, in the said policy contained, and to render liable and oblige the said defendant to insure the said plaintiff against loss or damage by fire to the amount of ——— dollars, and to make good to the said plaintiff any such loss or damage as should happen by fire, not exceeding the said last mentioned sum of ——— dollars, on the premises aforesaid, in the said policy described, and thereby intended to be insured, of which said burning and destruction by fire, and of the loss and damage aforesaid thereby occasioned to the said plaintiff, to wit, to the amount of ——— dollars, due notice and proof was afterwards, to wit, on the ——— day of ———, 18—, made by the said plaintiff to the said defendant, and was received at the office of the said defendant, in conformity to the conditions of the said policy.

**Policy Filed.**

**Interest of Plaintiff in Premises.** And the said plaintiff further says, that he has performed, fulfilled, observed, and complied with each and all of the conditions, provisos, and stipulations of the said policy, on his part and behalf to be performed, fulfilled, observed, and complied with, and has violated none of its prohibitions, according to the form and effect, true intent and meaning of the said policy. Yet the said plaintiff says that, although sixty days have elapsed since due notice and proof as aforesaid was made to the said defendant, as aforesaid, of the said burning and destruction by fire, and of the loss and damage aforesaid, thereby occasioned to the said plaintiff, the said defendant has not paid nor made good to the said plaintiff the said loss and damage of ——— dollars, or any part thereof, but the same

**Burning of House.**

**Amount of Loss.**

**Notice and proof of Loss made.**

**Performance by Plaintiff.**

**Default of Defendant.**

*Breach.* and every part thereof are wholly unpaid and unsatisfied to him, contrary to the force and effect of the said policy. And so the said plaintiff says, that the said defendant, although often requested, has not kept with the said plaintiff the agreement aforesaid, contained in the said policy, made between it and the said plaintiff in that behalf as aforesaid, but that the said defendant hath broken the same, and to keep the same with the said plaintiff has hitherto wholly refused, and still doth refuse, to the damage of the said plaintiff \$——. And therefore he brings his *suite*.

*Conclusion.*

C. R. B., p. q.

151. *Declaration in Assumpsit, upon a Policy of Life Insurance, under Virginia Statute.*

(V. C. 1878, c. 167, § 14; 2 Chit. Pl. 208, &amp; n (p) 541.)

*Title of Court and Rules.* Circuit Court for A County, to wit: — Rules, 18—.

*Queritur.* C. O., executor of the last will and testament of E. F., deceased, complains of the N. Y. M. L. I. Company, of a plea of trespass on the case in assumpsit: For this, to wit: that heretofore, in the life-time of the said E. F., to wit, on the — day of —, in the year of our Lord eighteen hundred and —, the said defendant

*Statement of Cause of Action.* caused to be made a certain policy of insurance in writing, purporting thereby and containing therein, that in consideration of — dollars, to the said defendant paid by the said E. F. in his life-time, the receipt whereof the said defendant thereby acknowledged,

*Making of Policy.* the said defendant undertook and promised the said E. F. that it, the said defendant, would pay to the said E. F.'s personal representatives and assigns, the sum of — dollars, within — months

*Tenor of Policy.* after due and sufficient proof should be made to the said defendant of the death of the said E. F. [in case the said E. F. should die before twelve of the clock at night, on the — day of —, in the

*Proof of Death required.* year 18—], provided the said E. F. should continue to pay yearly and every year to the said defendant, during the term of the said E. F.'s natural life, the like sum of — dollars, on or before the

*Proviso as to Premiums.* — day of —, in every year; and in the said policy contained, and to the same annexed were and are sundry other provisos, conditions, prohibitions, and stipulations; as by the original policy

*Sundry Provisos, Conditions, etc.* aforesaid [or a sworn copy of the said original policy], which is filed herewith, will more fully and at large appear.

*Policy Filed.* And the said plaintiff says that after the making of the said policy as aforesaid by the said defendant, to wit, on the — day of —, in the year 18—, the said E. F. departed this life, whereof afterwards, to wit, on the — day of —, in the year 18—, due and sufficient

*Death of Insured.* proof was made to the said defendant, in conformity to the terms and conditions of the said policy. And the said plaintiff further

*Proof of Death made.* says that the said E. F., in his life-time, did perform, fulfil, observe and comply with, and the said plaintiff, executor as aforesaid, since his death, has performed, fulfilled, observed and complied with each and all of the conditions, provisos and stipulations in the said policy contained, or to the same annexed, on the part and be-

*Performance by Insured.*

half of the said E. F., in his life-time, and of the said plaintiff, executor as aforesaid, since the death of the said E. F., to be performed, fulfilled, observed and complied with, and neither the said E. F., in his life-time, nor the said plaintiff at any time, has violated any of the prohibitions in the said policy contained, according to the form and effect, true intent and meaning of the said policy.

**Default of Defendant.** Yet the said plaintiff says that, although — months have elapsed, after due and sufficient proof was made, as aforesaid, to the said defendant of the death of the said E. F., the said defendant has not as yet paid to the said plaintiff, executor as aforesaid, the said sum of — dollars, but the same and every part thereof are wholly unpaid and unsatisfied to him, contrary to the force and effect of the said policy. And so the said plaintiff says that the said defendant has not kept with the said plaintiff the agreement aforesaid, contained in the said policy, made in this behalf as aforesaid, between it and the said E. F. in his life-time, but that the said defendant hath broken the same, and to keep the same with the said plaintiff has hitherto wholly refused, and still doth refuse, to the damage of the said plaintiff, executor as aforesaid, \$——; And therefore he brings his *suite*. [*Here, at common law, follows the profert of the letters of probate* [Form 104], *which in Virginia is allowed to be omitted. Ante, p. 589.*]

**Breach.**

**Conclusion.**

**Profert of Letters of Probate.**

P. A. B., p. q.

152. *Declaration in Assumpsit, upon a Policy of Life Insurance by a Stranger interested in the Life, under the Virginia Statute.*

(V. C. 1873, c. 167, § 14; 2 Chit. PL 208, & n (p), 541.)

**Title of Court and Rules.** Circuit Court for A County, to wit: — Rules, 18—.

**Queritur.** C. O. complains of the N. Y. M. L. I. Company, of a plea of trespass on the case in assumpsit: For this, to wit: that heretofore, to wit, on the — day of —, in the year of our Lord eighteen hundred and —, the said defendant caused to be made a certain policy of assurance in writing, purporting thereby, and containing therein, that in consideration of — dollars to the said defendant paid by the said plaintiff, the receipt whereof the said defendant thereby acknowledged, the said defendant undertook and promised the said plaintiff that the said defendant would pay to the said plaintiff the sum of — dollars, within — months after due and sufficient proof should be made to the said defendant of the death of one E. F., who was then alive, provided the said plaintiff should continue to pay yearly and every year to the said defendant, during the term of the natural life of the said E. F., the like sum of — dollars, [*the annual premium*] on or before the — day of —, every year; and in the said policy contained, and to the same annexed, were and are sundry other provisos, conditions, prohibitions, and stipulations, as by the original policy aforesaid, [*or a sworn copy of the said original policy*], which is filed herewith, will more fully and at large appear.

**Statement of Cause of Action.**

**Making of Policy.**

**Tenor of Policy.**

**Proof of death required.**

**Proviso as to Premiums.**

**Sundry Provisos, Conditions, &c.**

**Policy filed.**

**Interest of Pl'tt in Life Insured.** And the said plaintiff says, that at the time of the making of the said policy of assurance, and of the said promise and undertaking of the said defendant, the said plaintiff was then, and from thence until the time of the death of the said E. F., continued to be interested in the life of the said E. F. to a large amount, to wit, to the amount of all the moneys by him ever insured, or caused to be insured thereon; and the said plaintiff in fact further says, that

**Death of Insured.** after the making of the said policy as aforesaid by the said defendant, to wit, on the — day of —, in the year 18—, the said E. F. departed this life, whereof afterwards, to wit, on the — day

**Proof of Death made.** of —, 18—, due and sufficient proof was made to the said defendant, in conformity to the terms and conditions of the said

**Performance of Conditions, &c., averred** policy. And the said plaintiff further says, that the said E. F. in his life-time did perform, fulfil, observe, and comply with, and the said plaintiff in the said E. F.'s life-time, and ever since hitherto, has performed, fulfilled, observed, and complied with each and all the conditions, provisos and stipulations in the said policy contained, or to the same annexed, on the part and behalf of the said E. F. in his life-time, or of the said plaintiff at any time, to be performed, fulfilled, observed, and complied with, and that the said E. F. in his life-time did not, nor has the said plaintiff at any time violated any of the prohibitions in the said policy contained, or to the same annexed, according to the form and effect, true intent and meaning of the said policy.

**Default of Defendant.** Yet the said defendant says, that although more than — months have elapsed since due and sufficient proof was made as aforesaid, to the said defendant, of the death of the said E. F., the said defendant has not as yet paid to the said plaintiff the said sum of — dollars, [*amount of policy*,] but the same and every part thereof are wholly unpaid, and unsatisfied to him, contrary to the force and effect of the said policy. And so the said plaintiff says,

**Breach.** that the said defendant has not kept with the said plaintiff the agreement aforesaid contained in the said policy, made in this behalf as aforesaid, between the said defendant and the said plaintiff, but that the said defendant hath broken the same, and to keep the same with the said plaintiff has hitherto wholly refused, and still doth refuse, to the damage of the said plaintiff \$—. And therefore he brings his *suite*.

**Conclusion.**

R. D. C., p. q.

153. *Declaration in Assumpsit, upon a Policy of Insurance against Fire, at Common Law.*

(2 Chit. Pl. 536.)

**Title of Court and Rules.** Circuit Court for A County, to wit :  
— Rules, 18—.

**Queritur.** C. C. complains of the E. F. I. Company, of a plea of trespass

**Statement of Cause of Action.** on the case in assumpsit; for this, to-wit: that heretofore, to-wit, on the — day of —, in the year of our Lord eighteen hundred and —, the said defendant caused to be made a certain policy of

- Making of Policy.** insurance in writing, purporting thereby, and containing therein, that in consideration of ——— dollars to it paid by the said plaintiff, the receipt whereof the said defendant thereby acknowledged, the said defendant undertook and promised the said plaintiff that it, the said defendant, would insure the said plaintiff against loss or damage by fire, to the amount of ——— dollars, and would make good to the said plaintiff, his executors, administrators or assigns, any such loss or damage as should happen by fire, not exceeding the said last-named amount of ——— dollars, for the term of one year from the ——— day of ———, 18—, at twelve o'clock at noon, until the ——— day of ———, at twelve o'clock at noon, on and in respect of certain premises, then and ever since the property of the said plaintiff, in the said policy described as one, &c., [*as in the policy*]; the said loss or damage to be estimated according to the actual cash value of the said property at the time the same shall happen, and to be paid by the said defendant
- Tenor of Policy.** within ——— days after due notice and proof of such loss or damage, made by the said plaintiff, in conformity to the conditions of the said policy, should have been received at the office of the said defendant, unless the said defendant should have given notice of its intention to repair the damaged premises, or unless the said property be replaced by property of equal value and goodness; and in the said policy sundry provisos, conditions, prohibitions and stipulations, were and are contained, and were and are thereto annexed; as by the said policy, reference being thereunto had will more fully appear. And the said plaintiff in fact says, that the written application for insurance upon which the said policy was granted was as follows, that is to say: [*insert verbatim, such parts of the articles and conditions mentioned in the application as constitute a condition precedent.*] And the said plaintiff in fact further says, that
- Notice and Proof of Loss Required.** at the time of the making of the said policy of insurance by the said defendant, and at all times since, and now the said plaintiff was and is interested in the said insured [premises and property,] in the said policy mentioned and described as aforesaid, to a large amount to wit, to the amount of ——— dollars; and that the said premises and property [*describing the property insured and destroyed,*] in the said policy mentioned, and thereby intended to be assured, after the making of the said policy, and within the year aforesaid, to wit, on the ——— day of ———, 18—, were burned down, and consumed and destroyed by fire, which did not happen by means of or during any invasion, insurrection, riot, or civil commotion, or of any military
- Sundry Provisos, &c., in Policy.** or usurped power, or by any loss by theft at or after a fire, whereby the said plaintiff then sustained damage and loss to a large amount, to wit, to the amount of the said sum of ——— dollars, so assured on the said [premises and property,] so burned and consumed. And the said plaintiff further says, that the said [premises and property] in the said policy mentioned, and intended to be thereby assured, at the time of making the said policy were not, nor at any time since, have been insured in any other office or company, except to the amount of ——— dollars in the ———, and to the amount of ——— dollars in the ———, both of which said insurances were made in pursuance of the consent in writing of the said de-
- Tenor of Application for Insurance.**
- Interest of Plaintiff in Premises.**
- Burning of Premises.**
- Exclusion of excepted Causes of destruction.**
- Amount of Loss.**
- Not Insured elsewhere.**

Premises duly fendant, indorsed on the said policy. And the said plaintiff further described in says, that the said [premises and property] in the said policy mentioned were duly described in the said plaintiff's application for insurance. Insurance. insurance and in the said policy, and not otherwise than they really were, or so as to cause the said insurance to be effected upon a lower premium than ought to have been; and that the said plaintiff did forthwith, after the said loss and damage, to wit, on the — day of —, 18—, give notice in writing and make due proof of the same to the said defendant, at the office of the said defendant in —; and also, as soon after as possible, to wit, on the — day of —, 18—, did deliver to the said defendant, according to the stipulations of the said policy, as particular an account of his loss and damage as the nature of the case would admit, signed by the said plaintiff and accompanied by his oath, declaring the said account to be true and just, showing the ownership of the property insured; what other insurance existed on the same property, with a copy of the written portion of each such policy; what was the whole cash value of the subject insured; what was the plaintiff's interest therein; in what general manner (as to trade, merchandise, manufacture or otherwise,) the said premises insured, and the several parts thereof, were occupied at the time of the loss, and who were the occupants of such building; and when and how the fire originated, so far as the said plaintiff knew or believed. And the said plaintiff further says, that he produced to the said defendant a certificate under the hand and seal of —, a [magistrate,] most contiguous to the place of the fire, and not concerned in the loss as a creditor or otherwise, or related to the said plaintiff, stating that he, the said —, [the magistrate,] had examined the circumstances attending the fire, loss and damage by the said plaintiff sustained, that he was acquainted with the character and circumstances of the said plaintiff, and that he verily believed that he had by misfortune, and without fraud or evil practice, sustained loss and damage on the [premises and property] aforesaid, to the amount of — dollars. And the said plaintiff further says, that he then offered to submit to an examination or examinations under oath, by any person appointed by the said defendant, and to subscribe to such examination or examinations when reduced to writing. And the said plaintiff further says, that in all other particulars he complied with, performed and observed all other, the conditions, provisos, restrictions, prohibitions, and stipulations of the said policy, and of the application aforesaid, on his part to be complied with, performed and observed, according to the form and effect of the said policy and of the said application. Yet the said plaintiff says, that although — days have elapsed since due notice and proof as aforesaid was given and made to the said defendant as aforesaid, of the said burning and destruction by fire of the said [premises and property,] and of the loss and damage aforesaid thereby occasioned to the said plaintiff, yet the said defendant has neither replaced the said property by property of equal value and goodness, nor has it given notice of its intention to repair the damaged premises, nor has it paid, or made good to the said plaintiff, the said loss and damage of — dollars, or any part thereof, but the same and every

Notice and proof of Loss.

Amount of particulars of Loss, &c.

Performance by Pl't of all Conditions, &c.

Default of Defendant.



*Breach.*

part thereof are wholly unpaid and unsatisfied to him, contrary to the force and effect of the said policy. And so the said plaintiff says that the said defendant, although often requested, has not kept with the said plaintiff the agreement aforesaid, contained in the said policy made between the said defendant and the said plaintiff in that behalf as aforesaid, but that the said defendant hath broken the same, and to keep the same with the said plaintiff has hitherto wholly refused, and still doth refuse, to the damage of the said plaintiff \$—. And therefore he brings his *suite*.

*Conclusion.*

J. P. C., p. q.

154. *Declaration in Covenant, on a Deed, Warranting the Quantity and Title of Lands.*

*Title of Court and Rules.*

Circuit Court for A County, to-wit:

— Rules, 18—.

*Queritur.*

*Statement of Cause of Action.*

C. C. complains of D. D., of a plea of covenant broken: For this, to wit: that heretofore, to wit, on the — day of —, in the year of our Lord eighteen hundred and —, the said D. D. and L., his wife, by their certain deed of bargain and sale, sealed with their seals, and to the court now here shown, the date whereof is the day and year aforesaid, did, in consideration of — dollars, paid to them by the said plaintiff before the sealing and delivery of the said deed, the receipt whereof was thereby acknowledged, grant, bargain, sell, aliene and convey unto the said plaintiff, his heirs and assigns for ever, a certain tract or parcel of land, and its appurtenances, represented to contain — acres. And the said defendant, by the said deed, for himself and his heirs, did covenant with the said plaintiff, his heirs and assigns, that the said tract or parcel of land did contain the full quantity of — acres, in the said deed specified, and that the said defendant and his heirs would warrant and for ever defend the title to the said tract or parcel of land, against the claim or claims of all persons whatsoever unto the said plaintiff and his heirs and assigns for ever, [or otherwise setting forth the covenants as they exist,] as by the said deed, reference being thereunto had, will more fully and at large appear. And although the said plaintiff hath always, from the time of making the said deed hitherto, well and truly performed, fulfilled and kept all things therein contained on his part to be done, fulfilled and kept, according to the tenor and effect, true intent and meaning thereof; yet the said plaintiff in fact saith, that the said defendant, since the making of the deed aforesaid, hitherto, hath not performed, fulfilled and kept the said covenants in the said indenture contained, on his part to be performed, fulfilled and kept, according to the tenor and effect, true intent and meaning of the said deed, in this: that the said tract or parcel of land, in the said deed first mentioned, described and conveyed as containing — acres, does not in fact contain that quantity, but only the quantity of — acres; and the said plaintiff further saith, that at the time of making the said deed, a certain J. S. was entitled in fee simple, to — acres, part of the said tract of

land, by a good title, older and better than the title of the said defendant, and that in consequence and by reason thereof, the said plaintiff hath been disturbed in, and evicted from the possession and enjoyment of the said — acres, of the tract or parcel of land described and conveyed in and by the said deed; of all which said defendant afterwards, to wit, on the — day of —, in the year of our Lord eighteen hundred and —, had notice.

*Breach.*

And so the plaintiff in fact says, that the said defendant, (though often requested so to do,) hath not kept the said covenants so made by him for himself and his heirs as aforesaid, with the said plaintiff, in manner and form aforesaid, but hath broken the same, and to keep the same with the said plaintiff, hath hitherto wholly refused, and still doth refuse, to the damage of the said plaintiff of \$ — dollars. And thereupon he brings his *suite*.

*Conclusion.*

R. B. E., p. q.

155. *Declaration in Covenant, by Grantee against Grantor, on Covenant of Warranty of Title to Land.*

(1 Rob. Forms, 489; 4 Rob. Pr. 33; 2 Chit. Pl. 546, 543.)

*Title of Court and Rules.* Circuit Court for A County, to wit: — Rules, 18—.

*Queritur.* C. C. complains of D. D., of a plea of covenant broken: For

*Statement of Cause of Action.* this, to wit: that heretofore, to wit, on the — day of —, in the year 18—, by a certain indenture made between the said defendant of the one part, and the said plaintiff of the other part,

*Making of indenture.* which said indenture, sealed with the seal of the said defendant, is to the court now here shown, the date whereof is the day and year

*Profert of indenture.* aforesaid, the said defendant, for a certain valuable consideration therein mentioned, did grant, bargain, sell, aliene, enfeoff and confirm unto the said plaintiff and his heirs and assigns for ever,

*Covenant of Warranty.*

a certain tract or parcel of land, lying in the county of —, containing — acres, more or less, bounded and described as in the said indenture is more particularly set forth. And the said defendant did, by the said indenture, covenant for himself and his heirs, with the said plaintiff, his heirs and assigns, that the said defendant and his heirs would warrant and for ever defend to the said plaintiff, his heirs and assigns, the title to the said tracts or parcels of land, against all persons whatsoever, as by the said indenture, reference being thereunto had, will among other things more fully appear. [*Supposing the covenants relied on to be of the more perfect kind known as English covenants, (Ante, 41-'2,) the descriptions of the covenant, and of the breach following, must vary accordingly.*] And the said plaintiff in fact saith that, although the said plaintiff hath always, from the time of making the said indenture, hitherto well and truly performed, fulfilled and kept all things therein contained, on his part to be done and kept, according to the tenor and effect, true intent and meaning of the said indenture, yet that the said defendant, since the making of the said indenture, hath not performed, fulfilled and kept the said covenants in the said indenture contained, on his part to be performed, fulfilled and kept, according to the tenor and effect, true intent

*Breach of Warranty.*

and meaning of the said indenture, especially in this: that the said defendant has not defended to him the title to the said tract or parcel of land, against all persons whatsoever; but on the contrary thereof, M. H., who at the time of making the said indenture, and continually until the eviction hereinafter mentioned, had, and still has, lawful title to the said lands, did enter into the same, in and upon the possession of the said lands and appurtenances, and by due process of law, did eject, expel and remove the said plaintiff, against the will of the said plaintiff, from the possession and occupation of all and every the premises aforesaid, with the appurtenances, and every part thereof, and still keeps and holds out the said plaintiff from his possession and occupation thereof, to wit, on the — day of —, 18—, contrary to the form and effect of the said indenture, and of the said covenant of the said defendant, so by him made in that behalf, as aforesaid. By reason of all which said premises, the said plaintiff hath not only lost entirely, and been deprived of the said tract of land, with the appurtenances, in the said indenture described, and divers sums of money, amounting in the whole to a large sum, to wit, the sum of — dollars, by the said plaintiff laid out and expended in improving the said premises, but hath also been obliged to pay the costs and charges sustained by the said M. H., in prosecuting a certain action of ejectment for the recovery thereof, which amounted to a large sum of money, to wit, the sum of — dollars, and hath been further obliged to pay divers other sums of money, amounting in the whole to the sum of — dollars, in and about endeavoring to defend the said action of ejectment.

*Breach.* And so the said plaintiff saith, that the said defendant, although often requested so to do, hath not kept the said covenant so by him made as aforesaid, but hath broken the same, and to keep the same with the said plaintiff, hath hitherto wholly neglected and refused, and still doth neglect and refuse, to the damage of the said plaintiff \$—. And therefore he brings his *suite*.

*Conclusion.*

H. H. C., p. q.

156. *Declaration in Covenant, by Grantee against Grantor, on a Covenant of Warranty of Quantity.*

(1 Rob. Forms, 488; 4 Rob. Pr. 36.)

*Title of Court* Circuit Court for A County, to-wit:

*and Rules.*

— Rules, 18—.

*Queritur.*

*Statement of Cause of Action.*

*Making of Indenture.*

C. C. complains of D. D., of a plea of covenant broken: For this, to wit: that heretofore, to wit, on the — day of —, in the year 18—, by a certain indenture made between the said defendant, of the one part, and the said plaintiff, of the other part, which said indenture, sealed with the seal of the said defendant, is to the court now here shown, the date whereof is the day and year aforesaid, the said defendant, for a certain valuable consideration therein mentioned, did grant, bargain, sell, aliene, and convey unto the said plaintiff, and his heirs and assigns for ever, a certain tract or parcel of land, and its appurtenances, situated in the county of —,

containing by estimation — acres, more or less, bounded and described as in the said indenture is more particularly set forth. And the said defendant did by the said indenture, for himself and his heirs, covenant with the said plaintiff, his heirs and assigns, that the said defendant, and his heirs, would warrant and defend to the said plaintiff, and his heirs and assigns for ever, all the land thereby sold and conveyed, and the quantity thereof as in the said indenture specified, together with all the privileges and appurtenances to the same in any manner belonging, against the claims of all persons whatsoever, to, &c. [*setting forth the covenants of title as they are contained in the deed*], as by the said indenture, reference being thereunto had, will more fully and at large appear. And although the said plaintiff hath always, from the time of making the said indenture hitherto, well and truly performed, fulfilled, and kept all things therein contained on his part to be done, fulfilled, and kept, according to the tenor and effect, true intent and meaning thereof; yet the said plaintiff saith, that the said defendant, since the making of the said indenture, hitherto hath not performed, fulfilled and kept the said covenants and stipulations in the said indenture contained, on his part to be performed, fulfilled, and kept, according to the tenor and effect, true intent and meaning of the said indenture, and especially in this: that the said tract or parcel of land in the said indenture described and conveyed, and warranted as aforesaid by the said defendant to contain the said quantity of — acres, does not in fact contain that quantity, but only the quantity of — acres. And so the said plaintiff in fact says, that the said defendant, although often requested so to do, hath not kept the covenant so made by him as aforesaid, but hath broken the same, and to keep the same with the said plaintiff hitherto hath wholly neglected and refused, and still doth neglect and refuse, to the damage of the said plaintiff \$——. And therefore he brings his *suite*.

J. P. C., p. q.

157. *Declaration in Covenant, by Lessor against Lessee, for Non-Payment of Rent, and Not Repairing.*

(*Ante*, p. 881; 2 Chit. Pl. 552; Sands' Forms, 482; 1 Rob. Forms, 490.)

*Title of Court,* Circuit Court for A County, to wit:

*and Rules.* — Rules, 18—.

*Queritur.* C. C., complains of D. D., of a plea of covenant broken; For this, to wit: that heretofore, to wit, on the — day of —, in the year 18—, by a certain indenture then and there made between the said plaintiff, of the one part, and the said defendant, of the other part, which said indenture, sealed with the seal of the said defendant, is to the court now here shown, the date whereof is the day and year aforesaid, the said plaintiff, for certain valuable considerations therein mentioned, did bargain, grant, sell, lease, demise, and to farm let [*according to the words in the lease, see Ante*, p. 1328, Form 46,] unto the said defendant, and his assigns, a certain lot, messuage, or dwelling house, and tenement, with the

*Cause of Action.*

*Making of Indenture.*

*Tenor of Indenture.*

Rent Stipulated for.	apportenances, in the said indenture particularly mentioned and described, situate in —, to have and to hold the said lot, messuage, and tenement, with the appurtenances aforesaid, unto the said defendant, and his assigns, from the day of the date of the said indenture, to the full end and term of — years thence next ensuing, and fully to be complete and ended, [ <i>according to the terms of the lease</i> ]. Yielding and paying therefor to the said plaintiff, or his assigns, during the said term a rent of — dollars yearly, in equal quarterly payments, on the first day of the months of —, —, —, and —, respectively in each year [ <i>according to the terms of the lease</i> ].
Covenant by Plaintiff.	And the said plaintiff did thereby, for himself and his heirs, covenant and agree with the said defendant, and his assigns, that the said defendant, paying the rent thereinbefore reserved, and observing, keeping, and performing all and singular the covenants and agreements therein contained, on his and their part to be observed, kept, and performed, should peaceably and quietly, during the said term, possess and enjoy the said lot, messuage, and tenement aforesaid, with the appurtenances aforesaid, without let, hindrance, molestation, or disturbance from any one whomsoever. And the said defendant, for himself, his heirs and assigns, did thereby covenant and agree with the said plaintiff and his assigns, that the said defendant, or his heirs or assigns would, during the said term, well and truly pay in gold, to the said plaintiff or his assigns, the said yearly rent or sum of — dollars, at the several days and times aforesaid; but with the proviso and exception, that if the said messuage, tenement and premises, or some part thereof, shall happen to be burnt down or damaged by fire, tempest or other casualty not occasioned by the default of the said defendant or his assigns, then that in either of these cases, the said rent should either cease or be fairly apportioned, according as the said destruction of the said messuage, tenement and premises is entire or partial. [ <i>Let this be according to the words of the covenant.</i> ] And the said defendant, for himself, his heirs and assigns, did by the said indenture, further covenant and agree with the said plaintiff and his assigns, that the said defendant, his heirs or assigns, shall and will, at his or their proper costs and charges, from time to time, and at all times during the said term, well and sufficiently repair and cleanse the said messuage and tenement, and all and singular other the premises thereby demised, and every part and parcel thereof, by and with all, and all manner of needful and proper reparation, so as to preserve the same from decay and deterioration, excepting any casualty by fire or other occurrence which may consume or destroy the said messuage, tenement and premises, or any part thereof, without default on the part of the said defendant or his assigns, it being understood and agreed by and between the parties to the said indenture, that such loss or injury happening to the said messuage, tenement and premises, or any part thereof, without default on the part of the said defendant or his assigns, should be sustained by the said plaintiff, his heirs or assigns, and that on the happening of such injury or destruction as aforesaid, the said defendant should be entirely discharged from the obligations of this indenture, unless the said plaintiff should, within a
Covenant by Def't.	
To pay rent.	
Except if Premises destroyed, &c.	
To Repair.	
Except Casualties.	

	reasonable time after notice to him in writing of such complete or partial destruction, rebuild or repair the said messuage, tenement and premises, so that the same shall be in as good a condition as before such casualty occurred, and until such rebuilding or repair, that the rent aforesaid should be suspended or duly apportioned, [ <i>Observing that these covenants should be set out according to their terms</i> ], as by the said indenture, reference being thereunto had, will, amongst other things, more fully appear. By virtue of which said demise the said defendant afterwards, to wit, on the — day of —, 18—, entered into and upon all and singular the said demised premises, with the appurtenances, and became and was possessed thereof for the said term, so by him thereof granted as aforesaid. And although the said plaintiff hath always, from the time of making the said indenture hitherto, well and truly performed, fulfilled and kept, all things in the said indenture contained on his part and behalf to be performed, fulfilled and kept, according to the tenor and effect, true intent and meaning of the said indenture; yet protesting that the said defendant hath not performed, fulfilled or kept any thing in the said indenture contained, on his part and behalf to be performed, fulfilled and kept, according to the tenor and effect, true intent and meaning thereof, the said plaintiff says that, after the making of the said indenture, and during the said term thereby granted, to wit, on the — day of — 18— [ <i>the day up to which the arrears of rent are demanded</i> ], a large sum of money, to wit, the sum of — dollars of the rent aforesaid for — years [ <i>or months</i> ] of the said term, ending on the day and year last aforesaid, and then last elapsed, became and was due, and still is in arrear and unpaid to the said plaintiff, contrary to the tenor and effect, true intent and meaning of the said indenture, and of the said covenant of the said defendant by him in that behalf so made as aforesaid.
Entry by Lessee.	
Performance by Plaintiff.	
General Non-performance by Defendant.	
Special Non-performance by Defendant.	
Non-payment of Rent.	
Non-repair.	And the said plaintiff further says, that the said defendant did not nor would, during the said term, and whilst he was so possessed as aforesaid of the said demised premises, with the appurtenances as aforesaid, at his own costs and charges, well and sufficiently repair and cleanse the said messuage and tenement, and all and singular other the premises demised, and every part and parcel thereof by all manner of needful and proper reparation so as to preserve the same from decay and deterioration, according to the form and effect of the said indenture in that behalf; but on the contrary thereof, the said defendant, after the making of the said indenture as aforesaid, and during the continuance of the said term, and whilst he was so possessed of the said demised premises, with the appurtenances as aforesaid, to wit, on the day and year first aforesaid, and from thence for a long space of time, to wit, until the determination of the said term, permitted the said messuage, tenement, and premises, with the appurtenances, to be and continue, and the same were for and during all that time ruinous, prostrate, fallen down, and in great decay and deterioration for want of needful and proper reparation, contrary to the form and effect of the said indenture and of the covenant by the

**No Casualty by Fire, &c.** said defendant so made as aforesaid. And the said plaintiff says that, during the continuance of the said term, there was no casualty by fire or other occurrence without the default of the said defendant, whereby the said messuage, tenement, or premises, or their appurtenances aforesaid, were injured, consumed, or destroyed.

**Breach.** And so the said plaintiff, in fact, saith that the said defendant, although often requested so to do, hath not kept the said covenants so by him made as aforesaid, but hath broken the same, and to keep the same with the said plaintiff hath hitherto wholly neglected and refused, and still doth neglect and refuse, to the damage of the said plaintiff, \$——. And therefore he brings his *suite*.

**Conclusion.** B. F. C., p. q.

158. *Declaration in Trespass, by Executor against Administrator, for goods taken in the life-time of the Decedent.*

**Title of Court and Rules.** Circuit Court for A County, to wit: — Rules, 18—.

**Queritur.** C. C., executor of the last will and testament of E. F., deceased, complains of D. D., administrator of all and singular the goods and chattels, rights and credits, which were of G. H., deceased, at the time of his death, who died intestate, of a plea of trespass, for this, to wit, that the said G. H. in his life-time, to wit, on the — day of —, in the year of our Lord eighteen hundred and —, with force and arms, unlawfully took and carried away certain goods and chattels of the said E. F., deceased, in his life-time, to wit, —, [describe the chattels as in *trover*, 2 *Chit. Pl.* 835], of great value, to wit, of the value of — dollars, the same being then the lawful property of the said E. F., deceased, and in his quiet possession, and other wrongs and enormities to the said E. F., deceased, then did, against the peace of the Commonwealth, whereby a right of action accrued, by virtue of the act of the General Assembly in such case made and provided to the said E. F., deceased, in his life-time, and to the plaintiff, who since his death duly qualified according to law as executor of the last will and testament of the said E. F., deceased, to demand and receive of the said G. H., deceased, in his life-time, the amount of the value of the goods and chattels aforesaid, and other damages so as aforesaid done to the said E. F., deceased. Yet the said G. H. in his life-time, and the said defendant since his death, although often required, have hitherto refused to pay the same to the said E. F., deceased, in his life-time, and to the said plaintiff since his death, and the said defendant still doth refuse, to the damage of the plaintiff of \$——; and thereupon the said plaintiff, as executor as aforesaid, brings his *suite*. And the said plaintiff brings into court here, &c., [Profert of letters of Probate; *Ante*, p. 1364, form 104.]

**Conclusion.**

C. W. F., p. q.

159. *Declaration in Trespass for Assault and Battery.*

(2 Chit. Pl. 850.)

*Title of Court,* Circuit Court for A County, to wit :*and Rules*

— Rules, 18—.

*Queritur.**Statement of  
Cause of Ac-  
tion.**1st Count.*

C. C. complains of D. D., of a plea of trespass : For this, to wit, that heretofore, to wit, on the — day of —, in the year 18—, the said defendant, with force and arms, assaulted the said plaintiff, and then spit in the face of the said plaintiff, and, with great force and violence, seized and laid hold of the said plaintiff by his nose, and greatly squeezed and pulled the same, and then plucked, pulled, and tore large quantities of hair from and off the head of the said plaintiff, and then with a certain stick and with his fists, gave and struck the said plaintiff a great many violent blows and strokes on and about divers parts of his body ; and also then, with great force and violence, shook and pulled about the said plaintiff, and cast and threw the said plaintiff to the ground, and violently kicked him, and gave and struck him a great many other blows and strokes, and also then, with great force and violence, rent, tore and damaged the clothes and wearing apparel, to wit, one coat, one waistcoat, one pair of breeches, one cravat, one shirt, one pair of drawers, one pair of stockings, and one hat of the said plaintiff, of great value, to wit, of the value of — dollars, which the said plaintiff then and there wore, and was clothed with. [*Let the description of the battery conform in general to the fact.*] By means of which said several premises, the said plaintiff was then greatly hurt, bruised and wounded, and became and was sick, sore, lame, and disordered, and so remained and continued for a long space of time, to wit, for the space of — weeks then next following [*or hitherto*], during all which time the said plaintiff thereby suffered and underwent great pain, and was hindered and prevented from performing and transacting his necessary affairs and business, by him during that time to be performed and transacted, and also thereby the said plaintiff was obliged to pay, and did necessarily pay and expend a large sum of money, to wit, the sum of — dollars, in and about endeavoring to be cured of the bruises, wounds, sickness, soreness, lameness, and disorder aforesaid, occasioned by the said defendant as aforesaid. [*Describe the consequences of the battery without excessive exaggeration.*]

*2nd Count.*

And also for this, to wit, that afterwards, to wit, on the day and year aforesaid, the said defendant, with force and arms, made another assault on the said plaintiff, and again beat, bruised, wounded and ill treated him ; [and if the injury be very severe,

*Alia enormia.*

add, *insomuch that his life was thereby then greatly despaired of.*] And other wrongs to the said plaintiff then and there did, to the great damage of the said plaintiff, and against the peace of the Commonwealth. Wherefore the said plaintiff saith, that he is injured, and hath sustained damage to the amount of \$—. And

*Conclusion.*

therefore he brings his *suite*.

E. I. O., p. q-



160. *Declaration in Trespass, by Husband and Wife, for Battery of Wife.*

(2 Chit. Pl. 854.)

*Title of Court*, Circuit Court for A County, to wit:

*and Rules.* — Rules, 18—.

*Queritur.* C. C. and W. C. his wife, complain of D. D., of a plea of trespass; For this, to wit: that heretofore, to wit, on the — day of —, in the year 18—, the said defendant with force and arms assaulted the said W. C., then and still being the wife of the said C. C., and then beat, bruised, wounded and ill-treated her, so that her life was greatly despaired of. [*If the injury were not a very violent one, this last phrase should be omitted.*] And other wrongs to the said W. C. then and there did against the peace of the commonwealth, and to the damage of the said plaintiffs \$—. And therefore they bring their *suite*.

J. C., p. q.

161. *Declaration in Trespass, by Husband for Battery of Wife, Per Quod, &c.*

(2 Chit. Pl. 854-'5.)

*Title of Court* Circuit Court for A County, to wit:

*and Rules.* — Rules, 18—.

*Queritur.* C. C. complains of D. D., of a plea of trespass: For this, to wit: that heretofore, to wit, on the — day of —, in the year of our Lord, 18—, the said defendant, with force and arms, assaulted W. C., then and still being the wife of the said plaintiff, and then violently beat, kicked, bruised and ill treated, [*the trespasses are to be described according to the fact, as in first count of preceding Form,*] the said W. C., so then being the wife of the said plaintiff as aforesaid, insomuch that the said W. C., by means of the premises then became, and was sick, sore, lame, and disordered, and so remained and continued for a long space of time, to wit, for the space of — weeks, [*or hitherto,*] whereby the said plaintiff, during all that time, lost and was deprived of all the comfort, benefit, and assistance of his said wife in his domestic affairs, which he might and otherwise would have had; and thereby also, the said plaintiff was then obliged to pay and expend, and did necessarily pay and expend divers sums of money, in the whole amounting to a large sum, to wit, the sum of — dollars, in and about the endeavoring to heal and cure his said wife of the sickness, soreness, lameness, and disorder aforesaid, occasioned as aforesaid, and other wrongs to the said plaintiff the said defendant then and there did, against the peace of the Commonwealth, and to the damage of the said plaintiff \$—. And therefore he brings his *suite*.

W. J. D., p. q.

162. *Declaration in Trespass, for Running Cart against Plaintiff's Horse.*

(2 Chit. Pl. 860.)

*Title of Court* Circuit Court for A County, to wit:

*and Rules.* — Rules, 18—.

*Queritur.*

*Statement of Cause of Action.*

O. C. complains of D. D., of a plea of trespass; For this, to wit: that heretofore, to wit, on the — day of —, in the year 18—, the said defendant, with force and arms, drove a certain cart with great force and violence upon and against a certain horse of the said plaintiff of great value, to wit, of the value of — dollars, then being, and thereby with one of the shafts, and with other parts of the said cart of the said defendant, so greatly pierced, out, hurt, lacerated and wounded the said horse of the said plaintiff, that by reason thereof the said horse, being of the value aforesaid, afterwards, to wit, on the day and year aforesaid, died; And other wrongs to the said plaintiff the said defendant then and there did, to the damage of the said plaintiff \$——. And therefore he brings his *suit*.

*Alia enormia.*

*Conclusion.*

J. T. D., p. q.

163. *Declaration for Running a Carriage against the Plaintiff's Carriage, &c.*

(2 Chit. Pl. 860.)

*Title of Court* Circuit Court for A County, to wit:

*and Rules.* — Rules, 18—.

*Queritur.*

*Statement of Cause of Action.*

O. C. complains of D. D., of a plea of trespass: For this, to wit: that heretofore, to wit, on the — day of —, in the year 18—, the said defendant, with force and arms, drove a certain carriage, to wit, a stage-coach, which the said defendant was then driving along the public highway, with great force and violence against a certain other carriage, to wit, a buggy of the said plaintiff, of great value, to wit, of the value of — dollars, and in which said buggy the said plaintiff was then riding in and along the said highway, and thereby greatly broke to pieces, damaged, and spoiled the said buggy of the said plaintiff. And by means of the premises, the said plaintiff was then thrown with great force and violence out of his said buggy to the ground, and by means of the premises, the said plaintiff was afterwards, to wit, on the day and year aforesaid, obliged to lay out and expend, and did necessarily lay out and expend, a large sum of money, to wit, the sum of — dollars in and about the repairing and amending the damage so done to the said buggy as aforesaid; and also, by means of the premises, the said plaintiff then became and was greatly bruised, hurt and wounded, and sick, sore, lame and disordered, and so remained and continued for a long space of time, to wit, for the space of — weeks next following, [or *hitherto*,] and during all that time suffered and underwent great pain, and was hindered from transacting his lawful business by him during that time to be done, performed and transacted; and was also thereby obliged to pay and expend, and did necessarily pay and expend, divers sums of money, in the whole amounting to a large sum of money, to wit, the sum of — dollars,

in and about endeavoring to be cured of the sickness, soreness, lameness, and disorder aforesaid, occasioned as aforesaid; And other wrongs to the said plaintiff, the said defendant then and there did, to the damage of the said plaintiff \$——. And therefore he brings his *suite*.

W. G. D., p. q.

### 164. *Declaration in Trespass, for Chasing Sheep, &c.*

(2 Chit. Pl. 858.)

*Title of Court and Rules.* Circuit Court for A County, to-wit : — Rules, 18—.

*Queritur.* C. C. complains of D. D., of a plea of trespass: For this to wit:

*Statement of Cause of Action.* that heretofore, to wit, on the — day of —, in the year 18—, and on divers other days and times, between that day and before the commencement of this suit, the said defendant, with force and

1st Count. arms, drove, chased, and hurried the sheep, ewes and lambs, to wit, Chasing Sheep, — sheep, — ewes, and — lambs, of the said plaintiff, of great &c., from Pasture, value, to wit, of the value of — dollars, then depasturing and being upon a certain field of the said plaintiff, in the said county of —, and then and there chased and drove the said sheep, ewes and lambs, out of and from the said field to divers places, to the said plaintiff unknown, whereby the said plaintiff was not only put to great trouble and expense, amounting in the whole to a large sum of money, to wit, the sum of — dollars, in and about endeavoring to find his said sheep, ewes and lambs, but also divers thereof, to wit, — sheep, — ewes, and — lambs, of great value, to wit, of the value of — dollars, then and there died; and others thereof, to wit, — sheep, — ewes, and — lambs of great value, to wit, of the value of — dollars, then and there became and were wholly lost to the said plaintiff, and the residue of the said sheep, ewes and lambs, then and there became and were greatly damaged and lessened in value.

2nd Count. And for this also, that afterwards, to wit, on the — day of Chasing Sheep, —, in the year 18—, the said defendant, with force and arms, &c. chased and drove about other the cattle, to wit, — other sheep, — other ewes, and — other lambs of the said plaintiff, of great value, to wit, of the value of — dollars, whereby the said last mentioned sheep, ewes and lambs, being of the value aforesaid, became and were greatly damaged, lessened in value and spoiled. [State the damage to the cattle according to the fact, and which may be as in the first count, and if there be any evidence to support it add

*Alia enormia.* a count de bonis asportatis, as in 2 Chit. Pl. 859.] And other wrongs to the said plaintiff, the said defendant then and there did, to the damage of the said plaintiff \$——. And therefore he brings his *suite*.

D. Q. E., p. q.

165. *Declaration in Trespass, for Shooting Plaintiff's Horse or Dog.*

(2 Chit. Pl. 860.)

*Title of Court* Circuit Court for A County, to wit:  
*and Rules.* — Rules, 18—.

*Queritur.* C. C. complains of D. D., of a plea of trespass: For this, to wit:  
*Statement of* that heretofore, to wit, on the — day of —, in the year of  
*Cause of Ac-* our Lord 18—, the said defendant, with force and arms, shot off  
*tion.* and discharged a certain gun, then and there loaded with gunpow-  
 1st Count, der and shot, at and against a certain horse [or dog,] of the said plain-  
*Shooting Dog* tiff, of great value, to wit, of the value of — dollars, and thereby  
*or Horse.* and therewith so greatly shot, hurt, and wounded the said horse,  
 [or dog,] that by reason thereof the said horse, [or dog,] being of  
 the value aforesaid, died.

2nd Count, And also for this, to wit, that afterwards, to wit, on the day and  
*Beating Horse* year aforesaid, the said defendant, with force and arms, greatly  
*or Dog.* beat, hurt and wounded a certain other horse [or dog,] of the said  
 plaintiff of great value, to wit, of the value of — dollars, and

*Alia enormia.* by reason thereof the said horse [or dog] afterwards, to wit, on the  
 day and year aforesaid, died. And other wrongs to the said plain-  
 tiff the said defendant then did, to the damage of the said plaintiff

*Conclusion.* §——. And therefore he brings his *suite*.

G. D. F., p. q.

166. *Declaration in Trespass, for False Imprisonment.*

(2 Chit. Pl. 857.)

*Title of Court,* Circuit Court for A County, to wit:  
*and Rules.* — Rules, 18—.

*Queritur.* C. C. complains of D. D., of a plea of trespass: For this, to wit:  
*Statement of* that heretofore, to wit, on the — day of —, in the year 18—,  
*Cause of Ac-* the said defendant, with force and arms, assaulted the said plain-  
*tion.* tiff, and seized and laid hold of the said plaintiff, and with great  
 1st Count, force and violence pulled and dragged about the said plaintiff, and  
*Assault and* gave and struck the said plaintiff a great many violent blows and  
*imprisonment* strokes, and also forced the said plaintiff to go from and out of a  
*in Police Of-* certain dwelling house, situate and being in the county of —  
*fice.* into the public street there, and then and there forced him to go  
 in and along divers public streets to a certain police office, situate  
 and being in the county of —, and then and there imprisoned  
 the said plaintiff, and kept and detained him in prison there, with-  
 out any reasonable or probable cause whatsoever, for a long space  
 of time, to wit, for the space of — then next following, con-  
 trary to the laws of the land, and against the will of the said plain-  
 tiff, whereby the said plaintiff was then and there not only greatly  
 bruised, hurt and wounded, but was also thereby then and there  
 greatly exposed and injured in his credit and circumstances.

2nd Count. And for this also, that afterwards, to wit, on the day and year  
*Assault and* last aforesaid, at the county aforesaid, the said defendant with  
*imprisonm't* force and arms again assaulted the said plaintiff, and then and  
*generally.* there beat, bruised and ill-treated him, and then and there im-

prisoned him, and kept and detained him in prison there, without any reasonable or probable cause whatsoever, for a long time, to wit, for the space of — hours then next following, contrary to the laws of the land, and against the will of the said plaintiff.

*Alia enormia.* And other wrongs to the said plaintiff, the said defendant then  
*Conclusion.* and there did, to the damage of the said plaintiff \$——. And therefore he brings his *suite*.

W. H. F., p. q.

167. *Declaration in Trespass, for Breaking and Entering a Dwelling House, &c.*

(2 Chit. Pl. 863.)

*Title of Court and Rules.* Circuit Court for A County, to wit :  
 — Rules, 18—.

*Queritur.* C. C. complains of D. D., of a plea of trespass : For this, to wit :  
*Statement of Cause of Action.* that heretofore, to wit, on the — day of —, in the year 18—, and on divers other days and times between that day and the commencement of this suit, the said defendant, with force and

1st Count. arms, broke and entered a certain dwelling house of the said plaintiff, situate and being in the county of —, and then and there entering dwelling, and made a great noise and disturbance therein, and stayed and continued therein, making such noise and disturbance, for a long  
 spoil'g goods, space of time, to wit, for the space of — then next following,  
 &c. and then and there forced and broke open, broke to pieces and damaged divers, to wit, — doors of the said plaintiff, of and belonging to the said dwelling house, with the appurtenances, and broke to pieces, damaged and spoiled divers, to wit, — locks, — staples, and — hinges, of and belonging to the said doors, respectively, and wherewith the same were then fastened and provided, and of great value, to wit, of the value of — dollars.

And also, during the time aforesaid, to wit, on the said — day of —, 18—, with force and arms seized and took divers goods, and chattels, to wit, [*describe the goods and chattels as in trover, post, p. —*], of the said plaintiff, then being in the said dwelling house, and carried away the same, and converted and disposed of the same to his own use. By means of which said several premises the said plaintiff and his family were, during all the time aforesaid, not only greatly disturbed and annoyed in the peaceable possession of the said dwelling house of the said plaintiff, but also the said plaintiff was during that time hindered and prevented from carrying on and transacting therein his lawful and necessary affairs and business.

2nd Count, And for this also, that afterwards, to wit, on the — day of  
 Breaking and —, in the year 18—, the said defendant, with force and arms,  
 entering broke and entered a certain other dwelling house of the said plaintiff, situate in the county of —, and then and there ejected,  
 Dwelling and expelled, put out, and amoved the said plaintiff and his family  
 ejecting from the possession, occupancy, and enjoyment of the said last-mentioned dwelling house, and kept and continued them so ejected,  
 Family. expelled, put out, and amoved for a long space of time, to wit,

from thence hitherto, whereby the said plaintiff, for and during all that time, lost and was deprived of the use and benefit of his said last-mentioned dwelling house.

3d Count, And for this also, that afterwards, to wit, on the — day of  
Taking and —, in the year 18—, the said defendant, with force and arms  
Carrying seized, took, and carried away [if cattle, say—*seized, took, drove, led*  
away Goods. *and carried away,*] divers goods, chattels and effects of the said  
plaintiff, of the like number, quantity, quality, description and value  
as in the first count of this declaration mentioned, there then found  
and being, and converted and disposed of the same to his own use ;  
Alia enormia. And other wrongs to the said plaintiff the said defendant then  
Conclusion. and there did, to the damage of the said plaintiff \$——. And  
therefore he brings his *suite*.

W. W. F., p. q.

168. *Declaration in Trespass, for Breaking the Plaintiff's Close.*

(2 Chit. Pl. 866.)

*Title of Court* Circuit Court for A County, to wit:  
*and Rules.* — Rules, 18—.  
*Queritur.* C. C. complains of D. D., of a plea of trespass: For this, to wit:  
*Statement of* that heretofore, to wit, on the — day of —, in the year 18—, and  
*Cause of* at the county of —, and on divers other days and times between  
*Action.* that day and the commencement of this suit, the said defendant,  
Breaking and with force and arms, broke and entered divers, to wit, — closes  
enter'g closes. of the said plaintiff, situate in the county of —, and then and  
Breaking there forced and broke open, broke to pieces, damaged and spoiled,  
Gates, &c. divers, to wit, — gates of the said plaintiff, of great value, to  
wit, of the value of — dollars, then standing and being in the  
said closes, and the locks, staples and hinges, to wit, — locks,  
— staples, and — hinges of the said plaintiff of great value,  
to wit, of the value of — dollars, respectively, affixed to the said  
gates, and with which the said gates were then respectively locked,  
Treading down fastened and provided, and with feet in walking, trod down, tram-  
Grass, &c., pled upon, consumed and spoiled the grass, corn and other herbage  
with Feet. of the said plaintiff, of great value, to wit, of the value of — dol-  
With Cattle, &c. lars, there then growing and being, and with cattle, to wit, horses,  
mares, geldings, mules, oxen, cows and sheep, eat up and de-  
pastured the grass and corn of the said plaintiff, of great value, to  
wit, of the value of — dollars, then growing and being in the said  
closes, and with divers other horses, mares, geldings, mules, oxen,  
With Carts, &c. cows, and sheep, and also with the wheels of divers carts, wagons, and  
other carriages, crushed, tore up, damaged and spoiled other the  
grass, corn and other herbage of the said plaintiff, of great value,  
to wit, of the value of — dollars, then and there also growing  
and being, and with the feet of the said horses, mares and geldings,  
and with the wheels of the said carts, wagons, and other carriages,  
tore up, damaged and spoiled the earth and soil of the said closes ;  
Cutting down and also then and there mowed and cut down the grass and corn of  
Grass, &c. the said plaintiff, then growing in the said closes, and then and  
Carrying away there seized, took and carried away the hay and corn, to wit, —  
Corn, &c. cart loads of hay and — cart loads of corn of the said plaintiff,

of great value, to wit, of the value of — dollars, off and from the said closes, and converted and disposed of the same to his own use; and also then and there cut down and destroyed the trees and underwood, to wit, — oaks, — ash-trees, — elms, &c., [according to the fact,] and — other trees, and — acres of the underwood of the said plaintiff, of great value, to wit, of the value of — dollars, and the timber, wood, branches and bushes thereof, obtained and arising, to wit, — loads of timber, — loads of wood, and — loads of, branches of the said plaintiff, of great value, to wit, of the value of — dollars, took and carried away, and converted and disposed of the same to his own use; and also then and there broke down, prostrated and destroyed a great part, to wit, — perches of the walls, and — perches of the fences of the said plaintiff, of and belonging to the said closes respectively, and also then and there cast and threw divers large quantities of earth, stones and rubbish into divers, to wit, — ditches of the said plaintiff, of and belonging to the said closes respectively, and thereby and therewith, then and there choked and filled up the same; and also then and there caused to be put, placed and erected divers, to wit, — shambles, — stalls, — booths, and — tables in and upon the said closes, and kept and continued the said shambles, stalls, booths and tables, so there put, placed and erected, without the leave or license, and against the will of the said plaintiff, for a long space of time, to wit, from the said — day of —, in the year aforesaid hitherto; and thereby and therewith, during all the time aforesaid, greatly incumbered the said closes respectively, and hindered the said plaintiff from having the use, benefit and enjoyment thereof, in so large and ample a manner as he might and otherwise would have done. [Where there has been an expulsion, add a count as 2, in Form, 167, and in case of a removal of goods severed from the realty, a count de bonis asportatis, as in 3, same Form;]

**Alia enormia.** And other wrongs to the said plaintiff the said defendant then and there did, to the damage of the said plaintiff \$——. And therefore he brings his *suite*.

**Conclusion.**

J. K. P. G., p. q.

169. *Declaration in Ejectment.*

(V. C. 1873, c. 131, § 4, to 10.)

**Title of Court** Circuit Court for A County, to wit:  
**and Rules.** — Rules, 18—.

**Queritur.** C. C. complains of D. D., of a plea of trespass; For this, to wit:  
**Statement of** that heretofore, to wit, on the — day of —, in the year of our  
**Cause of Ac-** Lord eighteen hundred and —, [any day after the plaintiff's title  
**tion.** accrued; V. C. 1873. c. 131, § 7,] the said plaintiff was possessed for a term of — years, to be reckoned from the — day of —, in the year of our Lord eighteen hundred and —, and not yet expired or ended, [or "for term of his life," or "for an estate in fee simple absolute," or as the case may be,] of a certain tract or parcel of land, called —, lying and being in the said county of A, containing — acres of land, and bounded as fol-

lows, [describing the premises with such convenient certainty that if the plaintiff recovers possession may be delivered; V. C. 1873, c. 131, § 8,] and the said plaintiff says, that he, being so possessed of the said tract or parcel of land, the said defendant afterwards, to wit, on the — day of —, in the year of our Lord eighteen hundred and —, entered into the same, and that he unlawfully withholds from the said plaintiff the possession thereof, to the damage of the

*Conclusion.* [said plaintiff \$——. And thereupon he brings his *suite*.

D. A. F., p. q.

*Notice.* To Mr. D. D. :

You are hereby notified, that the foregoing declaration in ejectment against you will be filed at the next term of the circuit court for the county of A, on the first day of the term [or “*in the clerk's office of the circuit court for the county of A, at rules, to be holden for the said court, on the — Monday in — next.*”]

C. C., by D. A. F., his Atto.

See *Ante*, p. 772, &c., where is a declaration in ejectment for a widow's dower, with some observations thereupon, which the student is advised to read over as often as he uses this form, the observations being applicable to the action of ejectment in general.

# 170. Declaration in an Action of Account, by one Tenant in Common against another for Profits.

(V. C. 1873, c. 142, § 14; 3 Chit. Pl. 1297.)

*Title of Court and Rules.* Circuit Court for A County, to wit:

— Rules, 18—.

*Queritur.*

*Statement of Cause of Action.*

Ground for demanding an Account.

Failure to account.

C. C. complains of D. D., of a plea that he render to the said plaintiff a reasonable account for the time he was bailiff to the said plaintiff, in the said county of A; For this, to wit, that on the — day of —, in the year of our Lord eighteen hundred and —, and from thence for a long space of time, to wit, hitherto, the said plaintiff was lawfully seised in fee of one undivided moiety, or half part of and in a certain messuage, with the appurtenances, situate, &c. [according to the fact], and the said defendant, during all that time, held the said tenements, with the appurtenances, together with the said plaintiff as tenant in common, and the said defendant had also, during all that time, the care and management of the said premises, with the appurtenances, to receive and take the rents, issues, and profits thereof, and as bailiff of the said plaintiff, of what he received more than his just share and proportion thereof, to render a reasonable account thereof to the said plaintiff and his said share thereof, when the said defendant should be thereunto afterwards requested, according to the form of the statute in that case made and provided; and although the said defendant, during the time aforesaid, received more than his just share and proportion of the rents, issues, and profits of the said tenements, with the appurtenances. Yet the said defendant, although he was afterwards, to wit, on the — day of —, in the year of our Lord eighteen hundred and —, requested by the said plaintiff so to do, hath not yet ren-



dered a reasonable account to the said plaintiff of the said rents, issues, and profits, so received as aforesaid, or either of them, or any part thereof, or of the said share of the plaintiff, or any part thereof, but hath hitherto wholly neglected and refused so to do, contrary to the form of the statute in that case made and provided. Wherefore the said plaintiff says, that he is injured, and hath sustained damages to the amount of \$——. And therefore he brings his *suite*.

*Conclusion.*

W. C. F., p. q.

### 171. *Declaration in Detinue.*

(2 Chit. Pl. 593.)

*Title of Court  
and Rules.  
Queritur.*

Circuit Court for A County, to wit:  
— Rules, 18—.

*Statement of  
Cause of Ac-  
tion.*

1st Count,  
Bailm't to be  
re-delivered  
on request.

Non-delivery  
by Defendant.

2nd Count,  
On a supposed  
finding.

Plaintiff's loss  
of Chattels.  
Defendant's  
finding them.

Failure to de-  
liver.

C. C. complains of D. D., of a plea that he render unto the said plaintiff certain goods and chattels, [or "*deeds and writings*," according to the fact] of the said plaintiff of great value, to wit, of — dollars, which he unjustly detains from him: For this, to wit: that heretofore, to wit, on the — day of —, in the year of our Lord eighteen hundred and —, the said plaintiff delivered to the said defendant certain goods and chattels, to wit, [*describe the chattels as in trover, post, p. 1435, 2 Chit. Pl. 835,*] of the said plaintiff, of great value, to wit, of the value of — dollars, [*if the articles are separately of considerable value, it is better to state the separate value of each*] to be re-delivered by the said defendant to the said plaintiff, when he, the said defendant, should be thereunto afterwards requested; yet the said defendant, although he was afterwards, to wit, on the day and year aforesaid, requested by the said plaintiff so to do, hath not as yet delivered the said goods and chattels, or any of them, or any part thereof, unto the said plaintiff, but hath hitherto wholly neglected and refused, and still doth neglect and refuse so to do, and still unjustly detains the same from the said plaintiff.

And for this also, that the said plaintiff heretofore, to wit, on the — day of —, in the year of our Lord eighteen hundred and —, was lawfully possessed of certain other goods and chattels, to wit, [*describing them as in trover, 2 Chit. Pl. 835; post, p. 1435,*] of great value, to wit, of the value of — dollars, [*assigning a separate value to each article, if it be considerable*], as of his own property, and being so possessed thereof, the said plaintiff afterwards, to wit, on the — day of —, in the year of our Lord eighteen hundred and —, casually lost the said goods and chattels out of his possession, and the same afterwards, to wit, on the day and year last aforesaid, came to the possession of the said defendant by finding; yet the said defendant, well knowing the said last mentioned goods and chattels to be the property of the said plaintiff, and of right to belong and appertain to him, hath not as yet delivered the said last mentioned goods and chattels, or any or either of them, or any part thereof, to the said plaintiff, although he was afterwards, to wit, on the day and year last afore-

said, requested, by the said plaintiff so to do, but hath hitherto wholly refused, and still doth refuse so to do, and still doth detain the same from the said plaintiff, to the damage of the said plaintiff \$——. And therefore he brings his *suite*.

*Conclusion.*

J. B. F., p. q.

172. *Declaration in Trespass on the Case, in Trover and Conversion.*

(2 Chit. Pl. 835.)

*Title of Court and Rules.* Circuit Court for A County, to wit: — Rules, 18—.

*Queritur.* C. C. complains of D. D., of a plea of trespass on the case; For  
*Statement of Cause of Action.* this, to wit: that heretofore, to wit, on the — day of —, in the year of our Lord eighteen hundred and —, the said defendant was lawfully possessed as of his own property, of certain cattle, deeds, bonds, bills of exchange, promissory notes, bank notes, securities for money, money, goods and chattels, to wit, ten horses, ten mares, ten geldings, ten bulls, ten cows, &c., [*stating the different descriptions of the cattle,*] and a certain indenture of release, bearing date on the — day of —, in the year of our Lord eighteen hundred and —, purporting to be made by and between one E. F. of the one part, and G. H. of the other part, and purporting to be a conveyance from the said E. F. to the said G. H. of certain tenements therein mentioned, and a certain other deed purporting to be a mortgage of certain tenements by the said E. F. to to the said G. H., and a certain writing obligatory commonly called a bond, sealed with the seal of one N. O., whereby the said N. O. became bound to the said plaintiff in the penal sum of — dollars, and then still being in force; and a certain bill of exchange in writing, made and drawn by one E. F. upon, and accepted by the said defendant, bearing date heretofore, to wit, on the — day of —, in the year of our Lord eighteen hundred and —, whereby the said E. F. requested the said defendant — months after the date thereof, to pay to the said plaintiff, or his order, the sum of — dollars, and a certain other bill of exchange accepted by the said defendant, for the payment by the said defendant of a certain sum of money, to wit, the sum of — dollars, at a certain day therein mentioned and now past, and a certain promissory note in writing, made and drawn by one E. F., whereby the said E. F. promised to pay to the said plaintiff, or his order, a certain sum of money, to wit, the sum of — dollars, at a certain day therein mentioned and now past, and divers, to wit, — notes of the — bank, commonly called bank notes, for the payment of the sum of — dollars each; and divers, to wit, — pieces of the current coin of the United States, called —; and divers, to wit, — tables, — chairs, &c., [*specifying the goods and avoiding any repetition of the same articles, and describing each as generally as possible (omitting the quality,) as "mahogany," "silver," &c.,*] of great value to wit, of the value of — dollars. And being so possessed, the said plaintiff afterwards, to wit, on the day and year first above mentioned, casually lost the said cattle, deeds, bonds, bills of exchange, promissory note, bank notes, securities for money, money,

goods and chattels, out of his possession, and the same afterwards, to wit, on the day and year first aforesaid, came to the possession of the said defendant by finding. Yet the said defendant, well knowing the said cattle, deeds, bonds, bills of exchange, promissory note, bank notes, securities for money, money, goods and chattels, to be the property of the said plaintiff, and of right to belong and appertain to him, but contriving and fraudulently intending to deceive and defraud the said plaintiff in this behalf; hath not as yet delivered to the said plaintiff the said cattle, deeds, bonds, bills of exchange, promissory note, bank notes, securities for money, money, goods and chattels, or any or either of them, or any part thereof, although often requested so to do; and afterwards, to wit, on the day and year last aforesaid, converted and disposed of the said cattle, deeds, bonds, bills of exchange, promissory note, bank notes, securities for money, money, goods and chattels, to his own use, to the damage of the said plaintiff of \$——. And therefore he brings his *suite*.

J. E. G., p. q.

☞ If a second count is inserted for the *same property*, the description should not be repeated, but the declaration should be for "other cattle, goods and chattels of the like number, quantity, quality and description, and value, as those in the first count mentioned."

See 2 Chit. Pl. 837.

### 173. *Declaration in Trespass on the Case, for Slander at Common Law.*

(2 Chit. Pl. 633; 4 Rob. Pr. 709.)

*Title of Court and Rules.*

Circuit Court for A County, to wit:  
— Rules, 18—.

*Queritur.*

*Statement of Cause of Action.*

*Inducement. Pl'tf's previous good character.*

C. C. complains of D. D., of a plea of trespass on the case: For this, to wit, that [*here may be stated the inducement of the plaintiff's good character, and of his innocence of the conduct imputed to him by defendant; but as these inducements are not traversable, they may be omitted* (2 Chit. Pl. 620, n (m); *it may be as follows*], whereas the said plaintiff is a good, true, just and honest citizen of this Commonwealth, and as such hath always behaved and conducted himself, and until the committing of the grievances by the said defendant, as hereinafter mentioned, was always reputed, esteemed and accepted by and amongst all his neighbors, and other good and worthy citizens of this commonwealth, to whom he was known, to be a person of good name, fame and credit; and whereas also, the said plaintiff hath never been guilty, nor until the time of the committing of the said several grievances by the said defendant, as hereinafter mentioned, been suspected to have been guilty of perjury or false-swearing, [*the crime charged,*] or of any other crime as hereinafter stated to have been charged upon or imputed to him by the said defendant; by means whereof the said plaintiff, before the committing of the several grievances by the said defendant, as hereinafter mentioned, had deservedly obtained the good opinion and credit of all his neighbors, and other good and

Special Inducement explanatory of the slander. worthy citizens of this Commonwealth, to whom he was known, *[here state the special inducement necessary to explain the slander, as to which see 2 Chit. Pl. 621 ; 1 Do. 429, as thus]*: and whereas also, before the committing of the several grievances by the said defendant, as hereinafter mentioned, to wit, on the — day of —, in the year 18—, a certain suit had been, and was depending in the — court of —, in which one A. was plaintiff, and the said D. D. was defendant; and whereas the said A. having given due notice to the said D. D. of the time and place of taking the deposition of the said plaintiff, to be used and read as evidence according to law, on the trial of the said suit, called upon and required the said plaintiff afterwards, to wit, on the — day of —, 18—, to give his deposition, to be read and used as evidence as aforesaid, on the trial of the said suit, and the said plaintiff being so called on and required, was duly sworn, and did take his corporal oath upon the Holy Gospel of God, before one R. W., a justice of the peace, duly commissioned and qualified, in and for the county of —, and then and there having lawful power to administer an oath to the said plaintiff in that behalf, and the said plaintiff being so sworn, and having so taken his corporal oath, was then and there examined, and did proceed to answer to certain written interrogatories propounded to him by the said A., and to declare and state in writing the truth, the whole truth, and nothing but the truth, in reference to the subject-matter of the said interrogatories, which evidence and statement of the said plaintiff, in answer to the said interrogatories, were pertinent and material to the said suit of A. against the said D. D., then pending as aforesaid.

Defen't moved by malice and envy. And the said plaintiff says that the said defendant, well knowing the premises, but maliciously and wickedly contriving and intending to injure the said plaintiff in his aforesaid good name, fame and character, and bring him into public scandal, infamy and disgrace, and to cause it to be suspected and believed by and amongst his neighbors, and other good and worthy citizens of this Commonwealth, to whom he was known, that the said plaintiff had been and was guilty of perjury, and to subject him to the penalties prescribed by law therefor, and also to vex, harass, oppress, impoverish, and wholly ruin the said plaintiff, heretofore, to wit, on the — day of —, in the year 18—, in a certain discourse which the said defendant then and there had with the said plaintiff, in the presence and hearing of divers good and worthy citizens of this Commonwealth, the said defendant, in the presence and hearing of the said last mentioned citizens, falsely and maliciously spoke and published of and concerning the said plaintiff, and of and concerning the said plaintiff's answers to the said interrogatories in the deposition aforesaid contained, the false, scandalous, malicious and defamatory words following, that is to say, "beautiful deposition," (meaning the answers aforesaid), "there is not one word of it" (meaning the said deposition) "true; and you," (meaning the said plaintiff), "know it, Mr. C.," (meaning the plaintiff), "you are a most infamous man." By means of which said premises, the said plaintiff says that he has been greatly injured in his said name, fame and credit, insomuch that divers

With intent to defame.

Colloquium.

The Slander. Inuendoes.

Injury to Pl'tf generally.

good and worthy citizens of this Commonwealth, and especially one E. E. and one F. F., as well as others, who before and at the time of committing the said grievances by the said defendant, had been used and accustomed to deal with, and who otherwise would have continued to deal with the said plaintiff in the way of his trade and business as a factor or commission merchant, have, and each of them hath, from thence hitherto wholly failed and refused so to do, and also by means of the premises aforesaid, the said plaintiff hath been and is otherwise greatly injured and damnified, to the damage of the said plaintiff \$——. And therefore he brings his *suite*.

W. J. G., p. q.

174. *Declaration in Trespass on the Case, for Slander, under the Statute of Virginia.*

(V. C. 1873, c. 145, § 2; *Ante*, p. 383-'4; 4 Rob. Prac. 708-711.)

*Title of Court* Circuit Court for A County, to wit:  
*and Rules.* — Rules, 18—.

*Queritur.*

*Statement of Cause of Action.*

1st Count,  
Inducement.  
Plain'ff's good  
Character.

Special Induce-  
ment explana-  
tory of the  
Slander.

C. C. complains of D. D., of a plea of trespass on the case; For this, to wit: that whereas the said plaintiff is a good, true, just, and honest citizen of this Commonwealth, and as such hath always behaved and conducted himself, and until the committing of the grievances by the said defendant, as hereinafter mentioned, was always reputed, esteemed, and accepted by and amongst all his neighbors, and other good and worthy citizens of this Commonwealth to whom he was known, to be a person of good name, fame, and credit, whereby the said plaintiff, before the committing of the several grievances by the said defendant, as hereinafter mentioned, had deservedly obtained the good opinion and credit of all his neighbors, and of other good and worthy citizens of this Commonwealth to whom he was known. And whereas also, before the committing of the several grievances by the said defendant, as hereinafter mentioned, to wit, on the — day of —, in the year 18—, the said plaintiff was employed by the said defendant to live, together with the said plaintiff's wife and family, on the farm of the said defendant, lying, in the county of —, as the overseer and manager of the said farm for the said defendant; and that whilst the said plaintiff was so employed, and was so living, with his wife and family, upon the said farm, as the overseer and manager thereof for the said defendant, it happened that certain parcels, to wit, — pieces of bacon belonging to the said defendant, and deposited in the meat-house of the said defendant, upon the said farm, of a certain value, to wit, of the value of — dollars, had been and were feloniously stolen, taken, and carried away from the said meat-house and farm, but without the knowledge or connivance, and in spite of the utmost care and watchfulness of the said plaintiff, and had come, or by the said defendant were alleged to have come to the possession of one S., and by him were sold, or by the said defendant were alleged to have been sold to certain persons at or near certain coal-pits, situate and being in the county

<p><b>Defendant's</b> <b>Intent to in-</b> <b>sult Plaintiff,</b> <b>and injure</b> <b>him.</b></p>	<p>of ——. And the said plaintiff says, that the said defendant, well knowing the premises, but contriving and maliciously and wickedly intending to insult the said plaintiff, and to injure him in his good name, fame, and credit, and to bring him into public infamy, scandal, and disgrace, and to cause it to be suspected and believed by and amongst the said plaintiff's neighbors, and other good and worthy citizens of this Commonwealth, that the said plaintiff had been and was guilty of wickedly, illegally, and willfully allowing or conniving at the said theft of the said bacon, and the said unlawful selling thereof, at or near the said coal-pits, as</p>
<p><b>Colloquium.</b></p>	<p>aforesaid, in a certain discourse which the said defendant then and there had concerning the said plaintiff, and concerning the said theft and sale of the said bacon as aforesaid, in the presence and hearing of one M. T., and of divers other good and worthy citizens of this Commonwealth, then and there, in the presence and hearing of the said last-mentioned citizens, falsely and maliciously, and with the intention to insult the said plaintiff, spoke and published of and concerning the said plaintiff, and of and concerning the said theft and sale of the said bacon as aforesaid, the false, scandalous, malicious, defamatory, and insulting words following, which the said plaintiff avers to be, from their usual construction and common</p>
<p><b>The Slander.</b></p>	<p>acceptation, construed as insults, and to tend to violence and breach of the peace, that is to say, "S.," (meaning the said S. above mentioned, into whose possession the said bacon, after the same had been stolen, had come, or was alleged by the said defendant to have come as aforesaid,) "is trafficking and trading with C.," (meaning the said plaintiff,) "and he" (meaning the said S.), "is carrying the bacon" (meaning the bacon stolen from the said defendant,) "to the coal-pits to sell," (meaning that the said bacon had been stolen by the said plaintiff, or by or with his unlawful and dishonest connivance and consent, and had come unlawfully and by the dishonest connivance and act of the said plaintiff to the possession of the said S., who was carrying the same to the said coal-pits to sell.)</p>
<p><b>Innuendoes.</b></p>	
<p><b>2nd Count.</b></p>	<p>And for this also, that afterwards, to wit, on the — day of —, in the year 18—, at the county of —, in a certain other</p>
<p><b>Colloquium.</b></p>	<p>discourse which the said defendant then and there had in the presence and hearing of one M. T., and of divers other good and worthy citizens of this Commonwealth, the said defendant further contriving and maliciously intending to insult the said plaintiff, and to injure him in his good name, fame, and credit, and to bring him into public infamy, scandal, and disgrace, maliciously, falsely, and insultingly spoke and published of and concerning the said plaintiff, and of and concerning the plaintiff's wife, the false, scandalous, malicious, defamatory, and insulting words following, which the said plaintiff avers to be, from their usual construction and common acceptation, construed as insults, and to tend to violence and breach of the peace, and to have been construed as insults by the last-mentioned citizens, in whose presence and hearing the</p>
<p><b>The Slander.</b></p>	<p>said words were spoken and published as aforesaid, that is to say, "I" (meaning the said defendant,) "consider him" (meaning the said plaintiff,) "a damned scoundrel. I" (meaning the said defendant,) "could not trust him," (meaning the said plaintiff). "I"</p>
<p><b>Innuendoes.</b></p>	

(meaning the said defendant,) "consider his wife" (meaning the said plaintiff's wife,) "the worst, the damndest of the two."

Injury to Pl'ff generally.

By means of which said premises the said plaintiff says, that he has been greatly injured in his said name, fame and credit, inasmuch that divers good and worthy citizens of this commonwealth, to whom the innocence and integrity of the said plaintiff in the premises were unknown, have, on account and by reason of the committing of the said grievances by the said defendant as aforesaid, from thence hitherto, wholly refused, and still do refuse, to have any transaction, acquaintance or discourse with the said plaintiff, as they were before used and accustomed to have, and otherwise

Special Injury.

would have had; and also by reason of the said premises one E. F., who before and at the time of the committing of the said grievances by the said defendant, was about to retain and employ, and would otherwise have retained and employed the said plaintiff as his servant, and as the overseer and manager of a certain farm of the said E. F. for certain wages and reward to be therefore paid to the said plaintiff afterwards, to wit, on the — day of —, 18—, wholly refused to retain and employ the said plaintiff in the service and business of the said E. F., and the said plaintiff hath from thence hitherto remained and continued, and still is wholly out of employ; and also by means of the premises aforesaid, the said plaintiff hath been and is otherwise greatly injured and damnified, to the damage of the said plaintiff \$——. And thereupon he brings his *suite*.

Conclusion.

J. C. G., p. q.

### 175. *Declaration in Trespass on the Case, for Libel.*

(2 Chit. Pl. 627, 630 b.)

*Title of Court and Rules.* Circuit Court for A County, to wit: — Rules, 18—.

*Queritur.*

*Statement of Cause of Action.*

*Defendant's evil intent.*

C. C. complains of D. D., of a plea of trespass on the case: For this, to wit, that [*here may be inserted the inducement of the plaintiff's good character, and of his innocence of the crime imputed to him by the defendant, as Ante, Form 173; but as these inducements are not traversable they may be omitted*; 2 Chit. Pl. 620, n (m),] the said defendant contriving and maliciously intending to injure the said plaintiff in his good name, fame and credit, and to bring him into public scandal, infamy and disgrace, with and amongst all his neighbors, and other good and worthy citizens of this commonwealth, and to cause it to be suspected and believed by those neighbors and citizens, that the said plaintiff had been and was guilty of theft, [*or whatever is the offence imputed by the libel*,] and to subject him to the penalties by the laws of the land provided against and inflicted upon persons guilty thereof, and to vex, harass, oppress, impoverish, and wholly ruin the said plaintiff, heretofore, to wit, on the — day of —, in the year 18—, at the county of —, falsely, wickedly and maliciously, did compose and publish, and cause to be published, of and concerning the said plaintiff, a certain false, scandalous, malicious, and defamatory libel, containing amongst other things the false, scandalous, malicious, defamatory and libellous matter following, of and concerning

The Libel. the said plaintiff, that is to say: "He" (meaning the said  
Inuendoes. plaintiff,) "stole Mr. B.'s sheep." By means of the committing of which grievance by the said defendant as aforesaid, the said plaintiff hath been and is greatly injured in  
Injury to Pl'f his said good name, fame and credit, and brought into public  
generally. scandal, infamy and disgrace, with and amongst all his neighbors, and other good and worthy citizens of this commonwealth, inso-  
much that divers of those neighbors and citizens, to whom the innocence and integrity of the said plaintiff in the premises were unknown, have by reason of the committing of the said grievances by the said defendant as aforesaid, from thence hitherto suspected and believed, and still do suspect and believe, the said plaintiff to have been, and to be a person guilty of theft, and have, by reason of the committing of the said grievance by the said defendant as aforesaid, from thence hitherto wholly refused, and still do refuse, to have any transaction, acquaintance, or discourse with the said plaintiff, as they were before used and accustomed to have, and otherwise would  
Special Injury. have had. [*Here insert a statement of any special damage plaintiff has sustained in consequence of the libel. If the damage be the loss of service it may be stated as follows:*] And also by reason thereof, one E. F., who, before and at the time of committing the said grievance by the said defendant, was about to retain and employ, and would otherwise have retained and employed the said plaintiff as his servant, for certain wages and reward to be therefore paid to the said plaintiff afterwards, to wit, on the — day of —, 18—, wholly refused to retain and employ the said plaintiff in the service and employ of the said E. F., and the said plaintiff from thence hitherto hath remained and continued, and still is wholly out of employ. And the said plaintiff hath been and is, by means of the premises, otherwise greatly injured. To the  
Conclusion. damage of the said plaintiff \$——. And therefore he brings his  
*suite.*

T. M. H., p. q.

176. *Declaration in Trespass on the Case, for Libel of a Servant.*

(2 Chit. Pl. 630 b.)

*Title of Court* Circuit Court for A County, to wit:  
*and Rules.* — Rules, 18—.  
*Queritur.* C. C. complains of D. D., of a plea of trespass on the case: For  
*Statement of* this, to wit: that the said plaintiff, before the committing of the  
*Cause of Action.* said grievances by the said defendant, as hereinafter mentioned, had been, and was accustomed to employ himself as a servant, and gain his living by that employment, and had been retained  
*Inducement.* and employed by, and in the service of the said defendant, as his  
*Station of* Pl'ff and good [cook] and servant, and in that capacity, had behaved and con-  
*Character.* ducted himself with [good temper, activity, and civility, *using such terms as to negative the libel,*] and never was, nor until the time of the committing of the said grievances, was suspected to have been, or to be [bad-tempered, lazy or impertinent, *according to the terms of the libel.*] By means of which said several premises, the said  
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plaintiff, before the committing of such grievances by the said defendant, had not only deservedly gained the good opinion of all his neighbors, and divers other good and worthy citizens of this Commonwealth, but had also supported himself, and would thereafter have supported himself, by his honest, faithful, diligent and attentive exertions in the service of his masters and employers, had not such grievances been committed by the said defendant, as hereinafter mentioned. And whereas also the said plaintiff, before and at the time of the committing of such grievances, had quitted and left the service of the said defendant, and had been recommended to, and was likely to be retained and employed by, and in the service of one E. F., as a [cook] and servant, for certain wages, to be therefore paid to the said plaintiff, yet the said defendant, well knowing the premises, but contriving and maliciously intending to injure the said plaintiff in his said character, and to bring him into public scandal, infamy and disgrace, with and amongst all his neighbors, and other good and worthy citizens of this Commonwealth, and particularly with the said E. F., and to cause it to be suspected and believed that the said plaintiff, was not fit to be employed as a servant, and that he was [bad-tempered, and a lazy impertinent fellow, *corresponding to the terms of the libel,*] and thereby to prevent the said E. F. from retaining and employing the said plaintiff in his service, as otherwise he might and would have done, and to vex, harass, oppress, impoverish and wholly ruin the said plaintiff, and to deprive him of the means of supporting himself by honest and industrious employment, heretofore, to wit, on the — day of —, in the year 18—, at the county of —, wrongfully and unjustly did compose and publish a certain false, scandalous, malicious and defamatory libel of and concerning the said plaintiff, and of and concerning him in his said employment, and as such servant, containing therein the false, scandalous, malicious and defamatory and libellous matter following, of and concerning the said plaintiff, and of and concerning him in his said employment, and as such servant as aforesaid, that is to say, [*Here set out the libel, with proper innuendoes to show its application, as thus*]: “He,” (meaning the said plaintiff,) “is a bad-tempered, lazy, impertinent fellow.” [*Add other counts as the case may suggest, and if need be, a count stating the libel to be of and concerning the plaintiff, without reference to his character of servant.*] By means of the committing of which said grievances, the said plaintiff hath been, and is greatly injured in his said good character, and brought into public scandal, infamy and disgrace, with and amongst all his neighbors, and other good and worthy citizens of this Commonwealth to whom he was known, insomuch that divers of those neighbors and citizens, and in particular the said E. F., to whom the [good-temper, fidelity, activity, and civility, *according to the terms of the libel*] of the said plaintiff in the capacity of a servant, and otherwise, were unknown, have by reason of the committing of the said grievances, from thence hitherto, suspected and believed, and the said E. F. doth still suspect and believe, the said plaintiff to have been and to be a [bad-tempered, lazy, and impertinent person, *according to the terms of the libel,*]

Special Inducement explanatory of the Libel.

Defendant's evil intent.

The Libel.  
Innuendoes.

Injury to Pl'f generally.

and unfit to be retained or employed in the capacity of a servant.  
**Special Injury to Plaintiff.** And also by reason of the said premises, the said E. F. afterwards, to wit, on the day and year aforesaid, refused and declined to retain and employ the said plaintiff in his service as a [cook] or otherwise, as he otherwise might and would have done; and by reason thereof, the said plaintiff hath not only lost and been deprived of the support, sustenance, wages, gains and emoluments, which might and would otherwise have arisen and accrued to him, from and by reason of his being so retained and employed as last aforesaid, but hath from thence hitherto remained and continued, and still is out of employ, and deprived of the opportunity of supporting himself by honest and industrious means, and hath been and is, by means of the said several premises, otherwise greatly injured and damnified. To the damage of the said plaintiff \$——.  
**Conclusion.** And therefore he brings his *suite*.

C. D. H., p. q.

177. *Declaration in Trespass on the Case, for Malicious Prosecution for Felony.*

(2 Chit. Pl. 607.)

**Title of Court, and Rules.** Circuit Court for A County, to wit: — Rules, 18—.  
**Quoritur.** C. C. complains of D. D., of a plea of trespass on the case;  
**Statement of Cause of Action.** For this, to wit: that [here may be inserted the inducement of the plaintiff's good character, and of his innocence of the crime imputed to him, as *Ante*, Form 173. But as these inducements are not traversable, they may be omitted; 2 Chit. Pl. 607, n (q); Id. 620, n (m),] the said defendant, contriving and maliciously intending to injure the said plaintiff in his aforesaid good name, fame and credit, and to bring him into public scandal, infamy, and disgrace, and to cause the said plaintiff to be imprisoned for a long space of time, and thereby to impoverish, oppress, and wholly ruin him, heretofore, to wit, on the — day of —, in the year 18—, at the county of —, appeared before one R. W., esquire, then and there being one of the justices of the peace in and for the said county, and then and there, before the said justice of the peace, falsely and maliciously, without any reasonable or probable cause whatsoever, charged the said plaintiff with having feloniously stolen a certain gold watch of the said defendant, [or according to the charge,] and upon such charge, falsely and maliciously, and without any reasonable or probable cause whatsoever, caused and procured the said R. W., so being such justice as aforesaid, to make and grant his certain warrant, in due form of law, for the apprehending and taking of the said plaintiff, and for bringing the said plaintiff before the said R. W., or some other justice of the peace in and for the said county of —, to be dealt with according to law for the said supposed offence. And the said defendant, under and by virtue of the said warrant, afterwards, to wit, on the day and year aforesaid, wrongfully and unjustly, and without any reasonable cause whatso-

- Arrest of Plaintiff.** ever, caused the said plaintiff to be arrested by his body, and to be imprisoned and kept and detained in prison for a long space of time, to wit, for the space of — days [or *hours*] then next following, and until the said defendant afterwards, to wit, on the — day of —, 18—, at the county of —, falsely and maliciously, and without any reasonable or probable cause whatsoever, caused
- Commitment of Plaintiff.** the said plaintiff to be carried in custody before the said R. W., so being such justice as aforesaid, and to be committed by the said justice, for a further examination, to the jail of the said county of —, and in the said jail to be imprisoned, and to be kept and detained in prison for a long space of time, to wit, for the space of — then next following, and until the said defendant afterwards, to wit, on the — day of —, 18—, falsely and maliciously, and without any reasonable or probable cause whatsoever, caused the said plaintiff to be carried in custody before one G. H., esquire, then and there being a certain other justice of the peace in and for
- Examination of Plaintiff on the Charge.** the county of —, to be examined before the said justice touching the said supposed crime. Which said last-mentioned justice, having heard and considered all that the said defendant could say, allege, or prove against the said plaintiff, touching and concerning the said supposed offence, then and there, to wit, on the day and year last
- Acquittal of Plaintiff.** aforesaid, at the county aforesaid, adjudged and determined that the said plaintiff was not guilty of the said supposed offence, and then and there caused the said plaintiff to be discharged out of custody, fully acquitted of the said supposed offence; and the said defendant hath not further prosecuted his said complaint, but hath deserted and abandoned the same, and the said complaint and prosecution is now wholly ended;
- 2nd Count, More general.** And for this also, that the said defendant, further contriving and maliciously and wickedly intending as aforesaid, the said plaintiff to defame, impoverish, oppress, and ruin, heretofore, to wit, on the — day of —, in the year 18—, at the county of —, falsely and maliciously, and without any reasonable or probable cause whatsoever, charged the said plaintiff with having committed a certain offence, punishable by law, to wit, a felony; and upon such last-mentioned charge the said defendant then and there, to wit, on the day and year last aforesaid, at the county aforesaid, falsely and maliciously caused and procured the said plaintiff to be arrested by his body, and to be imprisoned, and to be kept and detained in prison for a long space of time, to wit, for the space of — then next following, and at the expiration of which said time the said plaintiff was fully acquitted and duly discharged of the said last-mentioned offence;
- Injury to Pl't generally.** By means of which said several premises, the said plaintiff hath been and is greatly injured in his said credit and reputation, and brought into public scandal, infamy, and disgrace, with and amongst all his neighbors, and other good and worthy citizens of this Commonwealth; and divers of those neighbors and citizens to whom his innocence in the premises was unknown, have by reason of the premises suspected and believed, and still do suspect and believe, that
- Special Injury.** the said plaintiff hath been and is guilty of felony; and also, by reason of the premises, the said plaintiff hath suffered great anxiety

and pain of body and mind, and hath been obliged to lay out and expend, and hath necessarily laid out and expended, divers sums of money, in the whole amounting to a large sum, to wit, the sum of — dollars, in and about the procuring of his discharge from the said imprisonment, and the defending of himself in the premises, and the manifestation of his innocence in that behalf, and hath been greatly hindered by reason of the premises, from following and transacting his lawful and necessary affairs and business for a long time, to wit, for the space of —; and also, by reason and means of the said premises, hath been and is greatly injured and damnified in his credit and circumstances. To the damage of the said plaintiff \$——. And therefore he brings his *suite*.

*Conclusion.*

J. W. H., p. q.

178. *Declaration in Trespass on the Case, for Keeping a Dog Used to Bite.*

(2 Chit. PL 596, 598.)

*Title of Court, and Rules.* Circuit Court for A County, to-wit: — Rules, 18—.

*Queritur.* O. C. complains of D. D., of a plea of trespass on the case:

*Statement of Cause of Action.* For this, to wit: that heretofore, to wit, on the — day of —, in the year 18—, [about the time of the injury], and from thence for a long space of time, to wit, until and at the time of the damage and injury to the said plaintiff, as hereinafter mentioned, at the

1st Count,  
Dog used to  
Bite.

county of —, the said defendant wrongfully and injuriously did keep a certain dog, the said defendant, during all that time, well knowing that the dog then was used and accustomed (\*) to attack and bite mankind; and which said dog afterwards, and whilst the said defendant so kept the same as aforesaid, to wit, on the — day of —, 18—, did attack and bite the said plaintiff, and did then and there greatly lacerate, tear, hurt and wound one of the legs of the said plaintiff; and thereby the said plaintiff then and there became and was sick, sore, lame and disordered, and so remained and continued for a long space of time, to wit, for the space of — months, then next following, during all which time the said plaintiff suffered and underwent great pain, and was thereby then and there hindered from performing and transacting his lawful affairs and business; and also by means of the premises, the said defendant was then and there put to great expense, costs and charges, in the whole amounting to a large sum of money, to wit, the sum of — dollars, in about endeavoring to be cured of the said wounds, sickness, lameness and disorder, so occasioned as aforesaid, and hath been, and is by reason of the premises, otherwise greatly injured and damnified.

Injury to Pl'ff.

2nd Count,  
Dog fierce.

And for this also, to wit, [a count stating that the dog "was of a ferocious and mischievous nature," &c.]

3rd Count,

Not secu'd, &c. properly secured or fed, as the facts may be.]

4th Count,

And for this also, that, &c., [as in first count to (\*)], to hurt,

Dog used to chase, bite, worry and kill sheep and lambs, which said dog afterwards, to wit, on the day and year aforesaid, and on divers other days and times, between that day, and the day of commencing this suit, did hunt, chase, bite, and worry divers, to wit, ——— sheep, and ——— lambs of the said plaintiff, of great value, to wit, of the value of ——— dollars, there then being; by means whereof divers, to wit, ——— of the said sheep, and ——— of the said lambs, being of great value, to wit, of the value of ——— dollars, then and there died, and became and were of no value to the said plaintiff, and the residue of the said sheep and lambs of the said plaintiff, being also of great value, were then and there greatly terrified, damaged and injured, and rendered of no use or value to the said plaintiff, to the damage of the said plaintiff \$——. And therefore he brings his *suite*.

*Conclusion.*

W. M. H., p. q.

### 179. *Declaration in Trespass on the Case, for a Public Nuisance.*

(2 Chit. Pl. 599.)

*Title of Court and Rules.* Circuit Court for A County, to wit: ——— Rules, 18—.

*Queritur.* C. C. complains of D. D., of a plea of trespass on the case: For this, to wit: that the said defendant, before and on the ——— day of ———, in the year 18—, [about the day of the injury], was the possessor and occupier of a certain messuage and premises, with the appurtenances, situate and being in the county of ———, and near to a certain common public highway there, in which there now is, and before and on the same day and year aforesaid there was, a certain hole, opening into a certain cellar and vault, of and belonging to the said messuage and premises of the said defendant;

*Def't possessor of premises.* yet the said defendant, well knowing the premises, whilst he was so the possessor and occupier of the said messuage and premises, with the appurtenances, and whilst there was such hole as aforesaid, to wit, on the day and year aforesaid, wrongfully and unjustly permitted the said hole to be and continue, and the same was then and there so badly and insufficiently covered, that by means of the premises, and for want of a proper and sufficient covering to the

*Nuisance.* said hole, the said plaintiff, who was then passing in and along the said highway, then and there necessarily and unavoidably alipt and fell into the said hole, and thereby the left leg of the said plaintiff was then and there fractured and broken, and the said plaintiff became and was sick, sore, lame, diseased and disordered, and so continued for a long space of time, to wit, from thence hitherto, during all which time the said plaintiff thereby suffered and underwent great pain, and was prevented from attending to and transacting his necessary and lawful affairs and business, by him during that time to be performed and transacted, and was also, by reason of the premises, obliged to expend, and did lay out and expend, a large sum of money, to wit, the sum of ——— dollars, in and about the endeavoring to get healed and cured of the said wounds, sickness, hurt and disorder, to the damage of the said plaintiff \$——. And therefore he brings his *suite*.

*Scienter of Defendant.*

*Injury to Pl'ff.*

*Conclusion.*

W. H., p. q.

180. *Declaration in Trespass on the Case, for a Nuisance in not cleaning a Privy and Cess-Pool.*

(2 Ohit. Pl. 772.)

*Title of Court and Rules.* Circuit Court for A County, to wit: — Rules 18 —.

*Queritur.* C. C. complains of D. D., of a plea of trespass on the case: For  
*Statement of Cause of Action.* this, to wit: that the said plaintiff, before and at the time of the committing of the grievances hereinafter mentioned, was and from thence hitherto hath been, and still is, lawfully possessed of a certain dwelling-house, with the appurtenances, situate and being in the — of —, and in which said dwelling-house, with the appurtenances, the said plaintiff and his family, at the times hereinafter mentioned, inhabited and dwelt, and still do inhabit and dwell, to wit, in the — of —, aforesaid. And the said defendant possessed and, before and at the time of the committing of the grievances of Privy, &c. hereinafter mentioned, was possessed of a certain privy and cess-pool, near the said dwelling-house, with the appurtenances, of the  
*Duty of Def't.* said plaintiff, and by reason thereof the said defendant, before and at the time of the committing of the grievance by the said defendant, as hereinafter mentioned, ought to have hindered and prevented the excrement, filth and water, from time to time, being in the said privy and cess-pool, from running and proceeding therefrom, unto and into the said dwelling-house, with the appurtenances, of the said plaintiff. Nevertheless the said defendant, well knowing the said last mentioned premises, but contriving, and wrongfully and unjustly intending to injure, prejudice, and aggrieve the said plaintiff, and to incommode and annoy him and his family in the possession, use, occupation and enjoyment of his said dwelling-house, with the appurtenances, heretofore, to wit, on the — day of —, 18—, and on divers other days and times  
*Scienter of Defendant.* between that day and the commencement of this suit, wrongfully and unjustly suffered divers large quantities of excrement, filth and water to penetrate, issue and flow from and out of the last mentioned privy and cess-pool, unto and into the said premises of the said plaintiff, and to stay and continue therein during all the time last aforesaid; and also thereby divers noisome, noxious, offensive and unwholesome smells, vapors and stenches, during the time aforesaid; proceeded and issued from the said privy and cess-pool, and ascended and came unto and into the said premises of the said plaintiff, and on those several days and times there greatly annoyed and incommoded the said plaintiff and his family in their said use and habitation of the said dwelling-house of the said plaintiff; and also, the said plaintiff hath been and is hindered and prevented from exercising and carrying on his trade and business of a —, in so beneficial a manner as he, before the committing of the said grievances by the said defendant had been used and accustomed to do, and would have continued to do, and hath thereby been deprived of great gains and profits which he otherwise might and would have derived and acquired.  
*Nuisance.*  
*Injury to Pl'ff.*  
*2nd Count,* And for this also, that before and at the time of the committing

Pl'ff. possessor of the grievances hereinafter next mentioned, the said plaintiff of Premises. was, and from thence hitherto hath been, and still is, lawfully possessed of a certain other messuage and premises, situate and being in the — of — aforesaid, and which said last mentioned messuage and premises the said plaintiff and his family, at the said several times hereinafter next mentioned, occupied, inhabited and dwelt in, and still do occupy, inhabit and dwell in, to wit, in the — of — aforesaid; yet the said defendant, well knowing the premises, but contriving and intending to injure, prejudice and aggrieve the said plaintiff, and to incommode and annoy him and his family in the possession, occupation and enjoyment of his said last mentioned messuage and premises, heretofore, to wit, on the — day of —, 18—, and on the several days and times aforesaid, wrongfully and injuriously caused divers noxious, offensive and unwholesome vapors, fumes, smells and stench to arise and ascend near to, in about the said last mentioned messuage and premises of the said plaintiff, and the same have thereby been rendered, and are become uncomfortable, unhealthy and unwholesome, and unfit for habitation; and the said plaintiff hath thereby been, and still is, greatly annoyed and incommoded in the possession, use, occupation and enjoyment of the said last mentioned messuage and premises, and hath been and is, by means of the premises, otherwise greatly injured and damaged. To the damage of the said plaintiff of \$—-. And therefore he brings his *suite*.

H. M. H., p. q.

181. *Declaration in Trespass on the Case, for Careless Driving by One's Servant.*

(2 Chit. Pl. 710.)

*Title of Court and Rules.* Circuit Court for A County, to-wit: — Rules, 18—.

*Queritur.* C. C. complains of D. D., of a plea of trespass on the case: For this, to wit: that heretofore, to wit, on the — day of —, in the year 18—, the said plaintiff was lawfully possessed of a certain carriage, to wit, a buggy of great value, to wit, of the value of — dollars, and of a certain horse [or *divers, to wit, — horses,*] then Pl'ff possessed drawing the same, and in which said carriage the said plaintiff was of Car'ge, and then riding in and along a certain public and common highway; riding in it. and the said defendant was also then possessed of a certain other Def't possessed carriage, and of a certain other horse, [or *divers, to wit, — of Carriage, horses,*] then drawing the same, and which said carriage and horse driven by a [or *horses,*] of the said defendant were then under the care, government, and direction of a certain then servant of the said defendant, who was then driving the same in and along the said highway. Nevertheless, the said defendant, then by his said servant so care- lessly and improperly drove, governed, and directed his said car- riage and horses, that by and through the carelessness, negligence, less driving by and improper conduct of defendant by his said servant in that be- half, the said carriage of the said defendant then ran and struck Def't's ser- vant. with great force and violence upon and against the said carriage of

Injury to Pl'ff. the said plaintiff, and thereby then crushed, broke to pieces, damaged, and destroyed the same, and the said carriage of the said plaintiff thereby then became and was rendered of no use or value to the said plaintiff; and thereby, (\*) the said plaintiff was then

Hurting his person.

thrown with great violence from and off his said carriage upon the ground, and by means of the premises aforesaid the said plaintiff was then greatly bruised, hurt and wounded, and became and was sick, sore, lame and disordered, and so continued for a long space of time, to wit, hitherto, during all which time the said plaintiff suffered great pain, and was hindered and prevented from performing and transacting his lawful affairs and business; and also by reason of the premises was obliged to pay and expend, and hath necessarily paid and expended divers sums of money, in the whole amounting to a large sum, to wit, the sum of ——— dollars, in and about the repairing of the said carriage of the said plaintiff so damaged as aforesaid, and in and about the endeavoring to get healed and cured of the said wounds, hurt, sickness and disorder.

2nd Count,

And for this, also, that the said plaintiff heretofore, to wit, on Pl'ff possessed the ——— day of ———, in the year 18—, was lawfully possessed of a Car. and of a certain other carriage, to wit, a ——— of great value, to wit, of riding in it. the value of ——— dollars, and of a certain other horse [or of *divers other horses, to wit, ——— horses,*] of great value, to wit, of the value of ——— dollars, which said horse [or *horses,*] was [or *were,*] then

harnessed to the said carriage, and in which said carriage the said plaintiff was then riding in and along a certain public highway; and

Def't possessed the said defendant was also then possessed of a certain other carriage, and of a certain other horse [or *divers, to wit, ——— other horses,*] drawing the same, and which said last-mentioned carriage

and horse [or *horses,*] the said defendant was then driving in and along the said highway. Nevertheless, the said defendant then so

carelessly and improperly drove, governed, and directed his said

carriage and horse, [or *horses,*] that by and through the carelessness,

negligence, and improper conduct of the said defendant, the said carriage of the said defendant then crushed, broke to pieces,

damaged, and destroyed the said carriage of the said plaintiff, and thereby, [conclude as in the first count, from the asterisk,] to the

damage of the said plaintiff \$——. And therefore he brings his *suite*.

T. T. H., p. q.

## 182. Declaration in Trespass on the Case, against a Common Carrier, for Injury to a Passenger.

(2 Ohit. Pl. 647 & seq.)

Title of Court Circuit Court for A County, to wit:  
and Rules. — Rules, 18—.

Queritur.

Statement of Cause of Action.

C. C. complains of D. D., of a plea of trespass on the case: For this, to, wit: that before and at the time of committing the grievances hereinafter mentioned, the said defendant was the proprietor of a certain stage-coach, for the carriage of passengers, and



1st Count, was a common carrier of passengers, for hire and reward to the  
 Def't a Com- said defendant in that behalf, from ———, to ———, [*the places*  
 mon Carrier. *from and to which plaintiff was to go*], to wit, at the county afore-  
 said; and the said defendant being such proprietor of the said  
 coach, and such common carrier of passengers heretofore, to wit,  
 Pl'ff a Passen- on the ——— day of ———, in the year 18—, the said plaintiff, at  
 ger. the special instance and request of the said defendant, became  
 and was a passenger in the said coach, to be safely carried thereby  
 on a certain journey, from ———, to ———, as aforesaid, for a  
 certain fare and reward to the said defendant in that behalf, and  
 the said defendant then and there received the said plaintiff as  
 Duty of Def't. such passenger, and thereupon it became and was the duty of the  
 said defendant to use due and proper care that the said plaintiff  
 should be safely carried by the said coach on the said journey;  
 yet the said defendant, not regarding his duty in that behalf, did  
 not use due and proper care that the said plaintiff should be safely  
 carried by the said coach on the said journey, but wholly neglected  
 so to do, and suffered one of the wheels of the said coach to be so  
 Wheel not se- insufficiently secured that the same then came off, and also suffered  
 cured. the said coach to be then so greatly overloaded that by reason  
 Coach over- thereof, afterwards, and whilst the said coach was proceeding  
 loaded. with the said plaintiff, in and along the public highway, on the  
 said journey from ——— to ———, as aforesaid, and before the  
 arrival thereof at ——— aforesaid, to wit, on the day and year  
 aforesaid, at the county aforesaid, the said coach then and there  
 Coach upset. became and was over-turned, and by means thereof, one of the  
 Pl'ff's leg bro- legs of the said plaintiff became and was broken, and the said  
 ken. plaintiff was otherwise greatly bruised, wounded, hurt and injured;  
 and also by means of the premises, the said plaintiff became and  
 Damage to was sick, sore, lame and disordered, and so continued for a long  
 Plaintiff. space of time, to wit, hitherto, during all which said time, the said  
 plaintiff suffered great pain, and was prevented from transacting  
 and attending to his lawful and necessary affairs and business, and  
 lost and was deprived of divers great gains, profits and advantages,  
 which he might and otherwise would have derived and acquired,  
 and thereby also the said plaintiff was obliged to pay and expend,  
 and did pay and expend, divers sums of money, amounting in the  
 whole to a large sum, to wit, the sum of ——— dollars, in and  
 about the endeavoring to be cured of the said fractures, bruises,  
 hurts and injuries, so received as aforesaid; and also thereby the  
 said plaintiff was prevented from continuing his said journey, and  
 was kept and detained at a certain inn, to wit, at ———, in the  
 county of ———, a long time, to wit, for the space of ——— weeks,  
 and during that time there incurred great expense, in the whole  
 amounting to a large sum of money, to wit, the sum of ———, in  
 and about his necessary support and maintenance.

2nd Count, And for this also, that before the committing of the several griev-  
 Def't Common ances hereinafter next mentioned, the said defendant was a com-  
 Carrier. mon carrier of passengers for hire, and as such was the proprietor  
 of a certain other stage-coach, by him used for the carriage of  
 passengers for certain hire and reward to the said defendant in  
 that behalf, from ——— to ———, [*the places from and to which*

*the passenger was to go*], to wit, at the county aforesaid, and being such common carrier, and such proprietor of the said stage-coach as aforesaid, the said defendant, on the — day of —, in the year 18—, at the county aforesaid, received into his said coach one

**Pl'ff's Wife a Passenger.** E. C., the wife of the said plaintiff, as a passenger, to be carried thereby on a certain journey, to wit, from — to —, as aforesaid, for certain fare and reward to the said defendant in that

**Duty of Def't.** behalf, and by reason thereof it became and was the duty of the said defendant to use due and proper care that the said E. C. should be safely carried by the said coach on the said journey; yet the said defendant, not regarding his duty in this behalf, conducted

**Def't careless, &c.** himself so carelessly, negligently and unskilfully in this behalf, that by reason of the carelessness, negligence, unskilfulness and default of the said defendant and his servants, and for want of due care and attention to his duty in that behalf, the said coach afterwards, and whilst the same was carrying the said E. C. on the said journey, and before the arrival thereof at — aforesaid, to wit, on the day and year aforesaid, at the county aforesaid, was

**Coach upset.** upset and thrown down, by means whereof the said E. C. then being therein as a passenger as aforesaid, was greatly cut, bruised

**Injury to Pl'ff's Wife.** and wounded, and divers bones of the body of the said E. C. were then and there broken, insomuch that the said E. C. thereby became and was very sick, weak and distempered, and so continued for a long space of time, to wit, from thence until the — day of —, 18—, during all which time the said plaintiff lost and was

**Damage to Plaintiff.** deprived of the comfort and society of his said wife, and also her aid in the management of his domestic affairs, which he would otherwise have enjoyed, and was obliged to lay out and expend, and did lay out and expend, divers sums of money, in the whole amounting to a large sum, to wit, the sum of — dollars, in and about the attempting of the cure of his said wife, and the procuring of the necessary attendance and assistance for her during her said sickness, weakness and distemper, which ensued by reason of her being so overturned and wounded as aforesaid, and which continued until the said — day of —, in the year aforesaid, on which said last mentioned day the said E. C. of her said wounds and injuries died, to the damage of the said plaintiff

**Conclusion.** \$—. And therefore he brings his *suit*.

M. H. H., p. q.

183. *Declaration in Trespass on the Case, against Common Carrier for Loss of Goods.*

(2 Chit. Pl. 651.)

**Title of Court** Circuit Court for A County.  
**and Rules.** — Rules, 18—.

**Queritur.** C. C. complains of D. D., of a plea of trespass on the case; For  
**Statement of Cause of Action.** this, to wit, that whereas the said defendant, before and at the time of the delivery to him of the goods and chattels as hereinafter next mentioned, was and from thence hitherto hath been, and still is, a common carrier of goods and chattels for hire, from a certain

Defendant place, to wit, from —, to a certain place, to wit, —. And  
Common Car- whereas also, whilst the said defendant was such common carrier  
rier of Goods. as aforesaid, the said plaintiff heretofore, to wit, on the — day of  
Plaintiff's —, in the year 18—, at —, [*the real place,*] caused to be de-  
Goods de- livered to the said defendant, and the said defendant then and  
livered to De- there received from the said plaintiff a certain parcel [or box] con-  
fendant to taining divers goods and chattels, to wit, &c. [*specify the articles ac-*  
carry. *cording to the exact description, as in trover; Form 172, Ante, p. 1435,*]  
of the said plaintiff of great value, to wit, of the value of — dol-  
lars, to be safely carried by the said defendant from — aforesaid,  
to — aforesaid, and there, to wit, at the said last-mentioned  
place, safely to be delivered for [or “to,” as the fact may be,] the  
said plaintiff, for certain reasonable reward to the said defendant  
Goods lost. in that behalf. Yet the said defendant, not regarding his duty as  
such common carrier as aforesaid, did not nor would safely carry  
the said [parcel] and its contents aforesaid from — aforesaid, to  
— aforesaid, nor there, to wit, at — aforesaid, safely deliver  
the same for [or to] the said plaintiff, but on the contrary thereof,  
the said defendant, so being such common carrier as aforesaid, so  
carelessly and negligently behaved and conducted himself in the  
premises, that by reason of the carelessness, negligence, and de-  
fault of the said defendant in the premises, the said [parcel] and  
its contents aforesaid, being of the value aforesaid, afterwards, to  
wit, on the day and year aforesaid, became and were wholly lost  
to the said plaintiff.

2nd Count, And for this also, that afterwards, to wit, on the day and year  
Defendant aforesaid, the said defendant, being such common carrier as afore-  
Common car- said, at his special instance and request, had the care and custody  
rier of goods. of a certain other [parcel], together with divers other goods and  
Plt'f's goods chattels of the said plaintiff, of the like number, quantity, quality,  
delivered to description, and value as those in the said first count mentioned.  
him. Yet the said defendant, being such common carrier as aforesaid,  
not regarding his duty in that behalf, did not, nor would, whilst he  
Goods lost. so had the care and custody of the said last-mentioned [parcel] and  
goods and chattels, take due and proper care of the same, or any  
part thereof, but wholly neglected so to do, and took such bad care  
thereof that afterwards, to wit, on the day and year last aforesaid,  
the said last-mentioned [parcel] and goods and chattels became and  
were wholly lost to the said plaintiff. To the damage of the said  
Conclusion. plaintiff \$——. And therefore he brings his *suite*.

J. S. J., p. q.

184. *Declaration in Trespass on the Case, against an Innkeeper,  
for the Loss of Goods.*

(2 Chit. Pl. .)

*Title of Court,* Circuit Court for A County, to wit:  
*and Rules.* — Rules, 18—.

*Queritur.* C. C., complains of D. D., of a plea of trespass on the case:  
*Statement of* For this, to wit: that whereas the said defendant, before and at  
*Cause of Ac-* the time of the loss hereinafter next mentioned, was and from thence  
*tion.* hitherto hath been and still is an innkeeper, and as such innkeeper,

**Def't an Inn-keeper.** the said defendant hath during all that time kept, and still doth keep, a certain common inn for the reception, lodging, and entertainment of travellers, to wit, at the county aforesaid. And whereas, also, the said defendant, so being such innkeeper, and so keeping the said inn as aforesaid, the said plaintiff [or if his servant, say *one E. F., the servant of the said plaintiff,*] heretofore, to wit, on the — day of —, in the year 18—, put up at, and was then and there received into the said inn as a traveller by the said defendant, and then brought into the said inn a certain trunk, [or *whatever else it was,*] containing certain goods and chattels, to wit, [enumerate and describe the chattels as in *trover*, Form 172, *Ante*, p. 1435,] of the said plaintiff, of great value, to wit, of the value of — dollars, and which said [trunk] and its contents aforesaid, were then and from thence until, and at the time of the loss hereinafter mentioned, within the said inn, and that the said plaintiff, [or *the said E. F., the servant of the said plaintiff,*] during all that time abided as a traveller therein. Yet the said defendant, so being such innkeeper as aforesaid, not regarding his duty as such innkeeper, did not keep the said [trunk] and its contents aforesaid, so brought into, and so being in the said inn as aforesaid, safely, and without diminution or loss; but on the contrary thereof, the said defendant and his servants so negligently and carelessly behaved and conducted themselves in that behalf that afterwards, and whilst the said plaintiff [or *the said E. F., the servant of the said plaintiff,*] so abided in the said inn as aforesaid, to wit, on the same day and year aforesaid, the said [trunk] and its contents aforesaid, were, by reason of the mere carelessness, negligence, and default of the said defendant and his servants in that behalf, wrongfully and unjustly taken and carried away by some person or persons to the said plaintiff, [or *to the said plaintiff and E. F., his servant, as aforesaid,*] as yet unknown, and were and still are thereby wholly lost to the said plaintiff.

**Goods rec'd.**

**Goods lost.**

**2nd Count,** And for this, also, that afterwards, to wit, on the — day of —, in the year 18—, at the county of — aforesaid, the said defendant, so being such innkeeper as aforesaid, at his special instance and request, had the care and custody of a certain other [trunk,] together with divers other goods and chattels of the said plaintiff, of like number, quantity, quality, description, and value as those in the first count hereof mentioned. Yet the said defendant, not regarding his duty in that behalf, did not, nor would, whilst he, being such innkeeper as aforesaid, had the care and custody of the said last-mentioned [trunk,] and goods and chattels, take due and proper care of the same, or any part thereof, but wholly neglected and failed so to do, and took such bad care thereof, that afterwards, to wit, on the day and year aforesaid, the said last-mentioned [trunk,] and goods and chattels became, and were wholly lost to the said plaintiff, to the damage of the said plaintiff \$—.

**Def't an Inn-keeper.**

**Goods of Pl'tf delivered to Def't.**

**Goods lost by Defendant's neglect.**

**Conclusion.** And therefore he brings his *suita*.

185. *Declaration in Trespass on the Case, for Disturbance of a Ferry.*

(*Ante*, p. 491; 2 Chit. Pl. 814; V. C. 1873, c. 64, § 21 to 24.)

*Title of Court* Circuit Court for A County, to wit:

*and Rules.*

— Rules, 18—.

*Queritur.*

*Statement of Cause of Action.*

1st Count,

Plaintiff owner of Ferry.

Def't *disturbed*  
Pla'tiff in his  
ferry, as at  
common law.

Damage to  
Plaintiff.

2nd Count,

Plaintiff owner of Ferry.

Def't *disturbed*  
Plaintiff in  
his Ferry.

O. C. complains of D. D., of a plea of trespass on the case; For this, to wit: that whereas the said plaintiff, before and at the time of the committing of the grievances hereinafter in this count mentioned, was, and from thence hitherto hath been, and still is, lawfully possessed of a ferry, in due form of law established, together with its appurtenances, for carriages, horses, beasts, and foot-passengers and their goods, across the river —, from a certain landing in the county of —, to a certain other landing in the county of —, taking for the conveyance of such carriages, horses, beasts, foot-passengers, and their goods, over and across such ferry, in any boat kept by the said plaintiff for that purpose, certain reasonable freights and ferriages, to wit, for a four-wheeled carriage, &c. [*state the rates of ferriage*], nevertheless, the said defendant, well knowing the premises, and contriving to disturb and injure the said plaintiff in the peaceable and lawful enjoyment of his said ferry, heretofore, to wit, on the — day of —, in the year 18—, and on divers other days between that day and the commencement of this suit, to wit, at the county of — aforesaid, injuriously and unlawfully, and against the will of the said plaintiff, conveyed in a certain boat of the said defendant divers carriages, horses, beasts, and foot-passengers, for hire, over and across the said river —, within half a mile of the plaintiff's said ferry, by reason whereof the said plaintiff hath lost and been deprived of divers profits and emoluments which would otherwise have arisen and accrued to him from the enjoyment of his said ferry, and hath been and is greatly prejudiced and disturbed in the possession thereof, and his right and title thereto.

And for this also, that whereas the said plaintiff, before and at the time of the committing of the grievances hereinafter mentioned, was and from thence hitherto hath been, and still is, lawfully possessed of another ferry, in due form of law established, together with its appurtenances, for carriages, horses, beasts, and foot-passengers, and their goods, across the river —, from a certain landing in the county of —, to a certain other landing in the county of —, taking for the conveyance of such carriages, horses, beasts, and foot-passengers, and their goods, over and across such ferry, in any boat kept by the said plaintiff for that purpose, certain reasonable freights and ferriages, to wit, for a four-wheel carriage, &c. [*state the rates of ferriage*]. Nevertheless the said defendant, well knowing the premises, but not regarding the statute in that case made and provided, and contriving to disturb and injure the said plaintiff in the peaceable and lawful enjoyment of his said ferry, heretofore, to wit, on — day of —, 18—, and on divers other days, to wit, on — days, and — several occasions between that day and the commencement of this suit, to wit,

Contrary to the Statute.	at the county of — aforesaid, injuriously and unlawfully, and contrary to the form of the statute in that case made and provided, and against the will of the said plaintiff, conveyed, in a certain boat of the said defendant, divers carriages, horses, beasts, and foot-passengers, for hire, over and across the said river —, within half a mile of the plaintiff's said ferry, by reason whereof, and by
Def't liable for Forfeiture.	the force of the statute aforesaid, the said defendant hath forfeited and hath become by law liable to pay to the said plaintiff the sum of twenty dollars for each and every of the said defendant's violations aforesaid, of the said plaintiff's said ferry rights and franchises, and his breaches as aforesaid of the said statute, which violations and breaches aforesaid amount in all to a great number, to wit, the number of —, none of which forfeitures and penalties, or any part thereof, has the said defendant at any time paid to the said plaintiff. By reason of which said premises the said plaintiff hath not only lost and been deprived of divers profits and emoluments, which would otherwise have arisen and accrued to him from the enjoyment of his said last-mentioned ferry, but also hath lost and been deprived of the penalties and forfeitures aforesaid. To the
Damage to Plaintiff.	damage of the said plaintiff \$——. And therefore the said plaintiff brings his <i>suit</i> .
Conclusion.	

C. F. J., p. q.

186. *Declaration in Trespass on the Case, for Disturbance of a Way.*

(Ante, p. 492; 2 Chit. Pl. 809.)

*Title of Court, and Rules.* Circuit Court for A County, to wit: — Rules, 18—.

*Queritur.* O. C. complains of D. D., of a plea of trespass on the case: For this, to wit: that whereas the said plaintiff, before and at the time of the committing of the grievances hereinafter mentioned was, and from thence hitherto hath been, and still is, lawfully possessed of a certain messuage and divers, to wit, — acres of land, with the appurtenances, situate in the county aforesaid, and the said plaintiff during all the time aforesaid ought to have had, and still of right, ought to have a certain cart-way from the said messuage and land of the said plaintiff, unto, into, through and over a certain close in the county aforesaid, unto and into a certain public highway in the county aforesaid, and so back again from the same public highway, unto, into, through and over the said close, and from thence into the said messuage of the said plaintiff, for himself and his servants to go, return, pass and repass, at all times at his and their free-will and pleasure. Yet the said defendant, well knowing the said premises, but wrongfully and unjustly intending to injure the said plaintiff in that behalf, and to deprive him of the use and benefit of his said way, whilst he was lawfully entitled thereto, to wit, on the — day of —, in the year 18—, and on divers other days and times between that day and the commencement of this suit, wrongfully and injuriously stopped up and obstructed the said last mentioned way. And the said plaintiff, by means thereof could not, during the time aforesaid, nor can he now have or enjoy his said last-mentioned way as he of right ought to have done, and

*Conclusion.* otherwise might and would have done, and hath been and is deprived of the use, benefit and advantage thereof, to the damage of the said plaintiff \$——. And therefore he brings his *suite*.

T. J., p. q.

### 187. *Declaration in Trespass on the Case, for Waste.*

(*Ante*, p. 473-'4; 2 Chit. Pl. 784; *Greene v. Cole*, 3 Saund. 252, c, & d, *note*.)

*Title of Court*, Circuit Court for A County, to wit :

*and Rules.*

• — Rules, 18—.

*Queritur.*

*Statement of Cause of Action.*

*Tenure of Defendant.*

C. C. complains of D. D., of a plea of trespass on the case : For this, to wit : that whereas the said defendant, before and at the time of the committing of the grievances hereinafter next mentioned, held and enjoyed a certain messuage or dwelling house, and divers, to wit, — acres of land, with the appurtenances, situate in the county of —, as tenant thereof to the said plaintiff for a certain term, to wit, the term of — years, from the — day of — in the year 18—, fully to be complete and ended ; Yet the said defendant, contriving wrongfully and unjustly to injure, prejudice, and aggrieve the said plaintiff in his reversionary estate and interest of and in the said messuage and land, with the appurtenances, whilst the same so were in the possession of the said defendant as tenant thereof to the said plaintiff as aforesaid, to wit, on the — day of —, in the year 18—, and on divers other days and times between that day and the commencement of this suit, at the county of — aforesaid, wrongfully and unjustly, [*Describe the waste according to the fact, as follows : to wit,*

*Waste.*

*Voluntary.*

*Voluntary waste by cutting down trees,*]—caused and procured to be felled, cut down, and prostrated divers trees, to wit, — oaks, — pines, — poplars, — maples, — apple trees, — walnut trees, and — other trees of the said plaintiff, of great value, to wit, of the value of — dollars, then standing, growing, and being in and upon the said land, and took and carried away the same, and converted and disposed thereof to his own use ;

*Permissive.*

[*Permissive waste for want of repairs,*]—permitted and suffered the said messuage or dwelling house, stables, barns, and out-houses, to be prostrate, ruinous, fallen down, and in great decay and deterioration in the timber, doors, windows, window-shutters, floors, joists, beams, rafters, weather-boarding, and shingles thereof, for want of needful repairing thereof ;

*Conclusion.*

Whereby the said plaintiff hath been and is greatly injured, prejudiced, and aggrieved in his reversionary estate and interest of and in the said messuage or dwelling-house, and land, with the appurtenances, to the damage of the said plaintiff \$——. And therefore he brings his *suite*.

W. P. K., p. q.

### 188. *Declaration in Trespass on the Case, for a False Warranty.*

(2 Chit. Pl. 679.)

*Title of Court* Circuit Court for A County, to wit :

*and Rules.*

— Rules, 18—.

*Queritur.*

C. C. complains of D. D., of a plea of trespass on the case ; For

*Statement of Cause of Action.* this, to wit: that heretofore, to wit, on the — day of —, in the year 18—, at the county of —, the said plaintiff, at the special instance and request of the said defendant, bargained with the said defendant to buy of the said defendant a certain [horse] at and for a certain price, to wit, the sum of — dollars, and the said defendant, by then falsely and fraudulently warranting the said [horse] to be [sound and quiet in harness], then and there sold the said [horse] to the said plaintiff for the said sum of — dollars, which was then and there paid by the said plaintiff to the said defendant; whereas, in truth and in fact, the said [horse] was at the time of the said warranty and sale thereof, [unsound, unsteady; restive and ungovernable in harness], and hath from thence hitherto so continued. And the said plaintiff in fact saith, that the said defendant, by means of the premises, on the day and year aforesaid, falsely and fraudulently deceived the said plaintiff on the sale of the said [horse] as aforesaid, and thereby the said [horse] afterwards, to wit, on the day and year aforesaid, not only became and was of no use or value to the said plaintiff, but also then and there greatly kicked, injured, and spoiled a certain other horse of the said plaintiff, of great value, to wit, of the value of — dollars, and thereby also the said plaintiff was then and there put to great expense, in the whole amounting to a large sum of money, to wit, the sum of — dollars, in and about the feeding and taking care of and selling and disposing of the said [horse].

*1st Count.* And for this also, that heretofore, to wit, on the day and year aforesaid, at the county aforesaid, the said plaintiff bargained with the said defendant to buy of the said defendant a certain other [horse]; and the said defendant, by then and there falsely warranting the said last-mentioned [horse] to be sound, falsely and fraudulently induced the said plaintiff then and there to buy, and the said plaintiff did then and there buy of the said defendant the said last-mentioned [horse] for a certain other large sum of money, to wit, the sum of — dollars; whereas, in truth and in fact, the said last-mentioned [horse], at the time of the said last-mentioned warranty and sale, was not sound, but then was, and thence hitherto hath been, and still is, unsound, and of no use or value to the said plaintiff. And so the said plaintiff saith, that the said defendant falsely and fraudulently deceived the said plaintiff on the sale of the last-mentioned [horse] as aforesaid. To the damage of the said plaintiff \$ ——. And therefore he brings his *suite*.

*2nd Count.*

*Warranty of horse.*

*Sound.*

*Breach of Warranty.*

*Damage to Plaintiff.*

*Conclusion.*

W. F. K., p. q.

189. *Declaration in Trespass on the Case, for False Representation of Character, &c.*

(2 Chit. Pl. 704; V. C. 1873, c. 140, § 1, (cl. 1).)

*Title of Court* Circuit Court for A County, to wit:

*and Rules.*

— Rules, 18—.

*Queritur.*

*Statement of Cause of Action.*

C. C. complains of D. D., of a plea of trespass on the case; For this, to wit: that before and at the time of the committing of the grievance by the said defendant as hereinafter next mentioned, the said plaintiff carried on the trade and business of a —, and one



E. F. was desirous to deal with, and to be trusted by the said plaintiff for divers goods, wares, and merchandize on credit, in the way of the said plaintiff's trade and business, and thereupon the said defendant heretofore, to wit, on the — day of —, in the year 18—, contriving to deceive and defraud the said plaintiff, and wrongfully, deceitfully, and fraudulently to induce the said plaintiff to deal with the said E. F. in the way of his trade and business, and to sell and deliver to the said E. F. divers goods, wares, and merchandize, upon trust and credit, the said defendant, by a certain writing by him then made, and signed with his name, the date whereof is the day and year aforesaid, falsely, fraudulently, and deceitfully then asserted and represented to the said plaintiff in substance that the said plaintiff might safely trust and give credit to the said E. F. in that behalf, and that the said plaintiff might safely sell and deliver to the said E. F. divers other goods, wares, and merchandize upon trust and credit. By means of which said last-mentioned false, fraudulent, and deceitful assertion and representation, the said defendant did then fraudulently and deceitfully induce the said plaintiff to deal with the said E. F. in the way of his said trade and business, and to trust and give credit to him in that behalf, and to sell and deliver to him divers other goods, wares, and merchandize, to a large amount, to wit, to the amount of — dollars, upon trust and credit. Whereas, in truth and in fact, at the time of the said defendant's making his said last-mentioned assertion and representation, the said plaintiff, as the said defendant then very well knew, could not safely trust and give credit to the said E. F., nor could the said plaintiff safely sell and deliver to the said E. F. any goods, wares, and merchandize upon trust and credit. And the said plaintiff further says, that the said E. F. hath not, nor hath any other person on his behalf, paid to the said plaintiff the said last-mentioned sum of money, so due to him for the said last-mentioned goods, wares, and merchandize, or any part thereof, but on the contrary thereof the said E. F. then was, and still is, wholly unable to pay the same, or any part thereof, to the said plaintiff, and the said plaintiff is likely to lose the same. To the damage of the said plaintiff \$—-. And therefore he brings his *suite*.

R. J. K., p. q.

### 190. *Declaration in Trespass on the Case, for Adultery.*

(2 Chit. Pl. 642.)

**Title of Court and Rules.** Circuit Court for A County, to wit : — Rules, 18—.

**Queritur.** C. C. complains of D. D., of a plea of trespass on the case : For this, to wit : that the said defendant, wrongfully and wickedly contriving and intending to injure the said plaintiff, and to deprive him of the comfort, fellowship, society and aid of E. C., the wife of the said plaintiff, and to alienate and destroy her affection for the said plaintiff, heretofore, to wit, on the — day of —, in the year 18—, and on divers other days and times between

**Adultery with** that day and the commencement of this suit, wrongfully and  
**Pliff's wife.** wickedly debauched and carnally knew the said E. C., then and  
still being the wife of the said plaintiff, and thereby the affection  
**Damage to** of the said E. C. for the said plaintiff was then alienated and  
**Plaintiff.** destroyed, and also, by means of the premises, the said plaintiff  
hath from thence hitherto wholly lost and been deprived of the  
comfort, fellowship, society and aid of the said E. C., his said  
wife, in his domestic affairs, which the said plaintiff, during all  
that time, ought to have had, and otherwise might and would  
**Conclusion.** have had. To the damage of the said plaintiff \$——. And  
therefore he brings his *suite*.

P. J. L., p. q.

191. *Declaration in Trespass on the Case, for Debauching  
Daughter or Servant.*

(2 Chit. Pl. 643.)

**Title of Court** Circuit Court for A County, to wit:  
**and Rules.** — Rules, 18—.

**Queritur.** C. C. complains of D. D., of a plea of trespass on the case: For  
**Statement of** this, to wit: that the said defendant wrongfully and wickedly con-  
**Cause of Ac-** triving and intending to injure the said plaintiff, and to deprive  
**tion.** him of the service and assistance of F. C., the [daughter and] ser-  
**Evil intent of** vant of the said plaintiff, heretofore, to wit, on the —— day of  
**Defendant.** ——, in the year 18—, and on divers other days and times be-  
**Averm't of re-** tween that day and the commencement of this suit, debauched  
**lation of mas-** and carnally knew the said F. C. then, and from thence for a long  
**and servant.** space of time, to wit, hitherto, being the [daughter and] servant of  
**Damage to** the said plaintiff, whereby the said F. C. became and was preg-  
**Plaintiff.** nant, and sick with child, and so continued for a long space of  
time, to wit, for the space of nine months then next following, at  
the expiration whereof, to wit, on the —— day of ——, in the  
year 18—, the said F. C. was delivered of the child with which she  
was so pregnant as aforesaid. By means of which said several  
premises, the said F. C., for a long space of time, to wit, from the  
day and year first above mentioned, hitherto, became and was un-  
able to do or perform the necessary affairs and business of the  
said plaintiff so being her [father and] master as aforesaid, and  
thereby the said plaintiff, during all that time, lost and was de-  
prived of the service of his said [daughter and] servant; and also  
by means of the said several premises, the said plaintiff was obliged  
to lay out and expend, and did necessarily lay out and expend,  
divers sums of money, in the whole amounting to a large sum, to  
wit, the sum of —— dollars, in and about the nursing and tak-  
ing care of the said F. C., his said [daughter and] servant, and in  
and about the delivery and taking care of the said child. To the  
damage of the said plaintiff \$——. And therefore he brings his  
**Conclusion.** *suite*.

J. C. L., p. q.

## FORMS OF PLEAS.

## FORMS OF PLEAS DILATORY.

192. *Plea to the Jurisdiction of the Court.*

(Ante, p. 626.)

<i>Title of Court, and Rules</i>	Circuit Court for A County, to wit : — Rules, 18—.
In proper person.	D. D. And the said defendant, in his own proper person, comes and says that this court ought not to have or
Denial of cognizance.	C. C. take any further cognizance of the action aforesaid of the said plaintiff, because he says that the cause of the said action did not, nor did any part thereof, arise in the said county of A., but that the cause of the said action, and every part thereof, did arise within the county of N.,* and that at the time of the issuing of the said writ in this cause, the said defendant did not reside in the said county of A., but that he did then reside, has ever since resided, and does now reside, in the county of N. And
<i>Statement of Defence.</i>	Offer to verify. this the said defendant is ready to verify.
<i>Conclusion.</i>	Prayer of Judgment. Wherefore, he prays judgment whether this court can or will take any further cognizance of the action aforesaid.

J. G. E., p. d.

*Affidavit*, V. C. Virginia,  
1873, c. 167,  
§ 88.

A County, to wit :

This day D. D. appeared in person before me, a justice of the peace, in and for the county and State aforesaid, and made oath that the matters and things stated in the foregoing plea are true, to the best of his knowledge and belief. Given under my hand, this — day of —, A. D., 18—.

(Signed,)

—, J. P.

¶ Inasmuch as the only ground for a *plea in suspension*, is that the plaintiff is an alien enemy, (*Ante*, p. 626-'7), it seems superfluous to insert a form for such a plea. See 1 Rob. Pr. (2nd ed), 295 & seq ; 5 Do. 28 & seq ; Wells v. Williams, 1 Ld. Raym. 282 ; Casseres v. Bell, 8 T. R. 166.

193. *Plea in Abatement for Coverture of Defendant at the time of Suit brought.*

(Ante, p. 628 ; 5 Chit. Plead. 899 ; 5 Rob. Pr. 53.)

<i>Title of Court, and Rules.</i>	Circuit Court for A County, to wit : — Rules, 18—.
	D. D. sued by the name of D. S., And the said defendant in this suit, to
	ads. wit, D. D., who is sued by the name of
In proper person.	C. C. D. S., in her own proper person, comes and prays judgment of the said writ and declaration of the said

\* The averment that the cause of action did arise within a *named county* (or *corporation*), as well as the county or corporation of defendant's residence, seems to be necessary in order to give the plaintiff a *better writ*, which is required in the case of all *dilatory pleas*.

See 5 Rob. Pr. 23, and the Reporter's abstract of Middleton v. Pinnell, 2 Grat. 202. But see Warren v. Saunders, 27 Grat. 265, 267.

*Statement of* plaintiff, because she says, that at the time of the issuing of the  
*Defence.* said writ of the said plaintiff, she was, and still is, the lawful wife  
*Conclusion.* of one Daniel D., who is still living, and now resides in the county  
*Offer to verify* of —. And this the said defendant is ready to verify. Where-  
fore, because the said Daniel is not named in the said writ and  
*Prayer of* declaration, she prays judgment of the said writ and declaration,  
*Judgment.* and that the same may be quashed.

W. D. G., p. d.

*Affidavit.* V. C. Virginia,

1873, c. 167,

§ 38.

A County, to wit :

This day, &c. [*as supra*, Form 192, p. 1460.]

194. *Plea in Abatement, for Variance between the Writ and Declaration.*

(Ante, p. 629 ; 5 Rob. Prac. 99 ; 1 Wentworth's Pl. 8.)

*Title of Court* Circuit Court for A County, to wit :*and Rules.* — Rules, 18—.

In proper D. D. And the said defendant, in his own proper person,  
person. ads. comes and *craves oyer* of the writ in this cause, and it  
Oyer of Writ. O. C. is read to him in these words, to wit :

[*Here insert the writ verbatim.*]

*Statement of* which being read and heard, the said defendant prays judgment of  
*Defence.* the said writ and declaration, and pleads that there is a variance  
*Variance.* between the said writ and the declaration thereupon in this particu-  
lar, that is to say, for that in the said writ it is said,

[*Insert the material part of the writ as to which the variance exists.*]and in the said declaration, founded upon the said writ, it is com-  
plained,[*Insert so much of the declaration as involves the supposed variance.*]

*Conclusion.* Therefore, because there is a manifest variance between the writ  
aforesaid and the said declaration, in the particulars aforesaid, the  
*Prayer of* said defendant prays judgment of the writ and declaration afore-  
*Judgment.* said, and that the same may be quashed.

F. T. G., p. d.

*Affidavit.* As *supra*, Form 192, p. 1460.

V. C. 1873, c.

167, § 38.

195. *Plea in Abatement, for Non-Joinder of a Co-Contractor.*

(Ante, p. 631 ; 3 Chit. Pl. 900 : St. Pl. 48 ; Id. (Tyler) 87.)

*Title of Court* Circuit Court for A County, to wit :*and Rules.* — Rules, 18—.

D. D. And the said defendant by his attorney comes and  
ads. prays judgment of the said declaration, because, he  
*Statement of* C. C. says, that the said several promises and undertakings  
*Defence.* in the said declaration mentioned, (if any such were made) were  
made jointly with one J. S., who is still living, and at the com-

*Conclusion.* commencement of this suit was and still is resident within the jurisdiction of this court, to wit, in the county of —, and not by the said defendant alone; and this the said defendant is ready to verify.

*Offer to verify.* Wherefore, inasmuch as the said J. S. is not named in the said declaration together with the said defendant, the said defendant prays judgment of the said declaration, and that the same may be quashed.

W. F. G., p. d.

*Affidavit.* As *supra*, Form 192, p. 1460.  
V. C. 1873, c.  
167, § 38.

196. *Plea in Abatement, for Non-Joinder of a Co-Obligor, in a Joint and Several Bond.*

(3 Chit. Pl. 900; *Ante*, p. 631.)

*Title of Court and Rules.* Circuit Court for A County, to wit: — Rules, 18—.

*Oyer of Bond.* D. D. And the said defendant, by his attorney, comes and  
ada. craves *oyer* of the said writing obligatory, and it is read  
C. C. to him in these words, to wit, [*here set out the obligatory part of the bond.*] He also craves *oyer* of the condition of the said supposed writing obligatory, and it is read to him in these words:

[*Here set out the condition, together with names of witnesses, signatures, &c., verbatim.*]

*Statement of Defence.* which being read and heard, the said defendant prays judgment of the writ and declaration aforesaid; because he says that at the said time of the sealing and delivery of the supposed writing obligatory aforesaid, whereon the said plaintiff against the said defendant complains, to wit, on the day and year aforesaid, the said E. F. in the said supposed writing obligatory named, did likewise seal and deliver the supposed writing obligatory aforesaid, as the act and deed of the said E. F. to the said plaintiff, and became firmly bound to the said plaintiff as aforesaid, jointly with the said defendant, by the same writing obligatory, in the said sum of — dollars, which said E. F. is yet living, and resides within the jurisdiction of this court, to wit, in the county of —, and this the said defendant is ready to verify. Wherefore, in as much as the said E. F. is not named defendant, together with the said defendant, in the writ and declaration aforesaid, the said defendant prays judgment of the writ and declaration aforesaid, and that the same may be quashed.

B. G., p. d.

*Affidavit.* As *supra*, Form 192, p. 1460.  
V. C. 1873, c.  
167, § 38.

197. *Demurrer to Declaration.*(V. C. 1873, c. 167, § 31; *Ante*, p. 621.)

*Title of Court* Circuit Court for A County, to wit:  
*and Rules.* — Rules, 18—.

*Demurrer.* D. D. And the said defendant says that the said declaration  
 ads. is not sufficient in law.  
 C. C.

L. W. G., p. d.

198. *Demurrer to any Pleading.*(V. C. 1873, c. 167, § 31; *Ante*, p. 621.)

*Title of Court* Circuit Court for A County, to-wit:  
*and Rules.* — Rules, 18—.

*Demurrer.* D. D. } { C. C. And the said ——— says that the said  
 ads. } or { vs. ——— [whatever may be the character of  
 C. C. } { D. D. the pleading,] is not sufficient in law.

L. C. H., p. d. (or p. q.)

199. *Joinder in Demurrer to any Pleading.*(V. C. 1873, c. 167, § 31; *Ante*, p. 622.)

*Title of Court* Circuit Court for A County, to wit:  
*and Rules.* — Rules, 18—.

*Joinder.* C. C. } { D. D. And the said ——— says that the said  
 vs. } or { ads. ——— [whatever the pleading is] is sufficient  
 D. D. } { C. C. in law.

J. W. H., p. q. [or p. d.]

## PEREMPTORY PLEAS.

Peremptory pleas, it will be remembered, are divided into pleas by way of *traverse*, and pleas by way of *confession and avoidance*.

See *Ante*, p. 632, 650 & seq.

That order will be observed in the forms, but without expressly discriminating between the two classes.

200. *Plea by way of Common Traverse in Covenant, on Indenture of Lease, for not Repairing.*

(Ante, p. 633; 3 Chit. Pl. 1019; St. Pl. 52; Id. (Tyler,) 90.)

*Title of Court* Circuit Court for A County, to wit:  
*and Rules.* — Rules, 18—.

*Statement of* D. D. And the said defendant, by his attorney, comes and  
*of Defence.* ads. says, that the said messuage and tenement was not nor  
 C. C. is in any part thereof ruinous, prostrate, fallen down,  
 or out of repair in manner and form as the plaintiff hath above  
*Conclusion.* thereof complained against the said defendant. And of this the  
 To the country. said defendant puts himself upon the country.

H. D. H., p. d.

201. *Plea by way of General Traverse, or General Issue, in Debt on Bond. Non est Factum.*

(*Ante*, p. 638 & seq. 640.)

*Title of Court and Rules.* Circuit Court for A County, to wit :  
— Rules 18—.

*Statement of Defence.* D. D. And the said defendant, by his attorney, comes and ads. says, that the said supposed writing obligatory [or C. C. "indenture" or "article of agreement" as the case may be] in the said declaration mentioned, is not his deed. And To the country. of this he puts himself upon the country.

H. W. H., p. d.

*Affidavit.* As *supra*, Form 192, p. 1460.  
V. C. 1873, c.  
167, § 38.

202. *Plea by way of General Issue in Debt on Simple Contract. Nil Debet.*

(*Ante*, p. 641.)

*Title of Court and Rules.* Circuit Court for A County, to wit :  
— Rules, 18—.

*Statement of Defence.* D. D. And the said defendant, by his attorney, comes and ads. says that he does not owe the said sum of ——— dollars, in the said declaration above demanded, in manner and form as the said plaintiff hath above thereof complained C. C. against him. And of this the said defendant puts himself upon Conclusion. To the country. the country.

J. L. J., p. d.

203. *Plea by way of General Issue in Covenant. Non est Factum.*

(*Ante*, p. 643, 640.)

*Title of Court and Rules.* Circuit Court for A County, to wit :  
— Rules, 18—.

*Statement of Defence.* D. D. And the said defendant, by his attorney, comes and ads. and says that the said supposed indenture, [or *what ever is the nature of the instrument*] in the said declaration mentioned, is not his deed. And of this the said defendant puts himself upon the country. C. C.

R. A. J., p. d.

*Affidavit,* As *supra*, Form 192, p. 1460.  
V. C. 1873, c.  
167, § 38.

204. *Plea by way of General Issue in Assumpsit. Non Assumpsit.*

(*Ante*, p. 644.)

*Title of Court and Rules.* Circuit Court for A County, to wit :  
 — Rules, 18—.

*Statement of Defence.* D. D. And the said defendant, by his attorney, comes  
 ads. and says that he did not undertake or promise in  
 C. C. manner and form as the said plaintiff hath above  
*Conclusion.* thereof complained. And of this the said defendant puts himself  
 To the country upon the country.

B. S. J., p. d.

(See *Ante*, p. 644 & seq.)

205. *Plea by way of General Issue in Detinue. Non-Detinet.*

(*Ante*, p. 643.)

*Title of Court and Rules.* Circuit Court for A County, to wit :  
 — Rules, 18—.

*Statement of Defence.* D. D. And the said defendant, by his attorney, comes  
 ads. and says that he doth not detain the said goods and  
 C. C. chattels in the said declaration mentioned, or any or  
 either of them, in manner and form as the said plaintiff hath  
*Conclusion.* above thereof complained. And of this the said defendant puts  
 To the country himself upon the country.

J. W. K., p. d.

206. *Plea by way of General Issue in Trespass. Not Guilty.*

(*Ante*, p. 647.)

*Title of Court and Rules.* Circuit Court for A County, to wit :  
 — Rules, 18—.

*Statement of Defence.* D. D. And the said defendant, by his attorney, comes  
 ads. and says that he is not guilty of the said trespass,  
 C. C. [or "said several trespasses"] above laid to his charge,  
 or any part thereof, in manner and form as the said plaintiff hath  
*Conclusion.* above thereof complained. And of this the said defendant puts  
 To the country himself upon the country.

J. A. K., p. d.

207. *Plea by way of General Issue in Trespass on the Case. Not Guilty.*

(*Ante*, p. 646.)

*Title of Court and Rules.* Circuit Court for A County, to wit :  
 — Rules, 18—.

*Statement of Defence.* D. D. And the said defendant, by his attorney, comes  
 ads. and says that he is not guilty of the said premises  
 C. C. above laid to his charge, in manner and form as the  
*Conclusion.* said plaintiff hath above thereof complained. And of this the  
 To the country said defendant puts himself upon the country.

P. K., p. d.



208. *Plea by way of Special Traverse, in Action for Rent.*

(Ante, p. 647 &amp; seq. 901 &amp; seq.; St. Pl. 167; Id. (Tyler,) 183.)

**NOTE.**—We are to suppose an action of covenant to be brought by C. C., as the son and heir of E. F., deceased, upon a lease made by E. F. in his life-time, for ——— years, to D. D., with a view to recover arrears of rent which are alleged to have accrued after E. F.'s death, (who is stated to have been seised in fee-simple). The plaintiff avers that the reversion, after E. F.'s death, descended upon him as the latter's heir, and that the arrears of rent are therefore his. The defendant, D. D., desires to show that E. F. had in fact only an *estate for life*, and that consequently the plaintiff has no such interest in the premises as he claims, and no right to the arrears of rent. The plea setting this defence forth by way of special traverse would be as follows:

*Title of Court* Circuit Court for A County, to wit:

*and Rules.*

— Rules, 18—.

<i>Statement of</i>	D. D.	And the said defendant, by his attorney, comes and
<i>Defence.</i>	ads.	says that the said E. F., deceased, at the time of the
<i>Inducement</i>	C. C.	making of the said lease, in the plaintiff's declaration
<i>or Explana-</i>		mentioned, was seised in his demesne as of freehold, for the term
<i>tion.</i>		of his natural life, of and in the said demised premises, with the
		appurtenances, and continued so seised thereof until and at the
		time of his death; and that after the making of the said lease, and
		before the expiration of the said term, to wit, on the — day of
		—, in the year 18—, the said E. F. died, whereupon the term
<i>Absque hoc</i>		created by the said lease wholly ceased and determined; without
<i>or Traverse.</i>		<i>this, that</i> , after the making of the said lease, the reversion of the
		said demised premises belong to the said E. F. and his heirs, in
<i>Conclusion.</i>		manner and form as the said plaintiff hath in his said declaration
<i>To the country.</i>		alleged. And of this the said defendant puts himself upon the
		V. C. 1873, c. country.
		167, § 27.

A. R. J., p. q.

209. *Plea by way of Special Traverse, in an Action for Waste.*

(Ante, p. 649.)

*Title of Court* Circuit Court for A County, to wit:

*and Rules.*

— Rules, 18—.

<i>Statement of</i>	D. D.	And the said defendant, by his attorney, comes and
<i>Defence.</i>	ads.	says that the said waste and destruction of the said de-
<i>Inducement or</i>	C. C.	mised premises, in the said plaintiff's declaration men-
<i>Explanation.</i>		tioned, was committed and done by a force of rebels, marshalled in
		arms, and making war against the government of the United States,
		and the government of this Commonwealth, with the purpose and in-
		tention to overthrow the said governments, and by violence and war
		to set up and maintain an usurped government or governments in
		the room thereof, and the said waste and destruction was committed
		and done by the said rebels, so as aforesaid marshalled in arms, and
		making war, without the will and against the consent of the said
		defendant, and with a force and violence which he was not able to
<i>Absque Hoc</i>		resist. Without <i>this, that</i> , the said defendant was or is guilty of
<i>or Traverse.</i>		the waste and destruction of the said demised premises, in manner

*Conclusion.* and form as the said plaintiff hath in his said declaration complained To the country. against him. And of this the said defendant puts himself upon V. C. 1873, c. the country.

167, § 27.

G. E. L., p. q.

### 210. *Plea of Payment.*

(3 Chit. PL 974 ; *Ante*, p. 653 & seq ; V. C. 1873, c. 168, § 1.)

*Title of Court and Rules.* Circuit Court for A County, to wit :  
— Rules, 18—.

*Statement of Defence.* D. D. And the said defendant, by his attorney, comes ads. and says that before the commencement of this suit, C. C. to wit, on the — day of —, in the year of our Lord eighteen hundred and —, the said defendant paid to the said plaintiff the said sum of — dollars, in the declaration Offer to verify. demanded. And this the said defendant is ready to verify.

J. A. K., p. d.

Formal defence, *actio. non* and prayer of judgment omitted, pursuant to V. C. 1873, c. 167, § 25, 29 ; *Ante*, p. 653, 615-16.

### 211. *Plea of Part Payment.*

(*Ante*, p. 654 & seq.)

*Title of Court and Rules.* Circuit Court for A County, to wit :  
— Rules, 18—.

*Statement of Defence.* D. D. And the said defendant, by his attorney, comes ads. and says that as to — dollars, part of the said C. C. sum above demanded, the said plaintiff ought not to have or maintain his action aforesaid thereof against him, because he says that before the commencement of this suit, to wit, on the — day of —, in the year of our Lord eighteen hundred and —, the said defendant paid to the said plaintiff the said sum of — dollars. And this the said defendant is ready Offer to verify. to verify. Whereupon he prays judgment whether the said plaintiff, as to the said sum of — dollars, ought to have or maintain his action aforesaid thereof against him.

W. A. L., p. d.

See St. PL 403 ; V. C. 1873, c. 167, § 25.

### 212. *Plea upon Payment of Money into Court.*

(V. C. 1873, c. 168, § 2, 3 ; *Ante*, p. 610 ; 4 Mees. & W. 2.)

*Title of Court and Rules.* Circuit Court for A County, to wit :  
— Rules, 18—.

*Statement of Defence.* D. D. And the said defendant, by his attorney, comes ads. and says that [or in case it be pleaded to *part only*, C. C. add—"as to — dollars, being part of the sum in the said declaration mentioned," or "as to the residue of the sum of — dollars"], the said plaintiff ought not further to maintain his action, because the said defendant now brings into court here the sum of — dollars, ready to be paid to the said plaintiff ;

and the said defendant further says, that the said plaintiff has not sustained damage to a greater amount [or in an action of debt, say—"that the said defendant does not owe to the said plaintiff a greater amount"] than the said sum of ——— dollars, in the introductory part of this plea mentioned. And this the said defendant is ready to verify. Wherefore, he prays judgment if the said plaintiff ought further to maintain his action thereof against him.

B. F. L., p. d.

### 213. *Plea of Non-Damnificatus, on a Bastardy Bond.*

(*Ante*, p. 988, 1004; 3 Chit. Pl. 983; St. Pl. 336, 360; Id. (Tyler,) 306-'7, 322.)

*Title of Court and Rules.* Circuit Court for A County, to wit: — Rules, 18—.

*Statement of Defence.* D. D. And the said defendant, by his attorney, comes and ads. says that the said overseers of the poor of the county C. C. of ——— aforesaid, at the time of the making of the said supposed writing obligatory, and their successors in office for the time being, have not at any time since the making of the said writing hitherto, been in any manner whatsoever damnified for, or by reason or by means of any thing in the said condition of the said writing obligatory contained. And this the said defendant is ready to verify.

H. R. L., p. d.

See V. C. 1873, c. 167, § 29, 25.

### 214. *Plea of Non-Damnificatus, on a Bastardy Bond, Craving Oyer of Bond and Condition.*

*Title of Court, and Rules.* Circuit Court for A County, to wit: — Rules, 18 —.

*Oyer of bond.* D. D. And the said defendant, by his attorney, comes ads. and craves *oyer* of the said supposed writing obligatory, and it is read to him in these words:

[Here insert the bond *verbatim*];

*Oyer of Condition.* and the said defendant also craves *oyer* of the condition of the said supposed writing obligatory, and it is read to him in these words:

[Here insert the condition *verbatim*];

*Statement of Defence.* which, being read and heard, the said defendant says that the said overseers of the poor of the county of ——— aforesaid, at the time of the making of the said supposed writing obligatory, and their successors in office for the time being, have not been at any time since the making of the said writing hitherto in any manner whatsoever damnified for, or by reason, or by means of anything in the said condition of the said writing obligatory contained. And this the said defendant is ready to verify.

*Conclusion.* Offer to verify. said condition of the said writing obligatory contained. And this the said defendant is ready to verify.

O. L. L., p. d.

215. *Plea of Non-Damnificatus, on Bond of Indemnity.*

(Ante, p. 988, 1004; 3 Chit. Pl. 984; St. Pl. 336, 360; Id. (Tyler,) 306, 322.)

*Title of Court* Circuit Court for A County, to wit:  
*and Rules.* — Rules, 18—.

*Statement of* D. D. And the said defendant, by his attorney, comes and  
*Defence.* ads. says that the said plaintiff hath not at any time since  
 C. C. the making of the said writing obligatory, and the  
 condition thereto annexed hitherto, been in any wise damnified by  
*Conclusion.* reason or by means of any thing in the said condition of the said  
*Offer to verify.* writing obligatory contained. And this the said defendant is ready  
 to verify.

W. H. M., p. d.

216. *Plea that the Defendant did Indemnify*

(Ante, p. 988, 1004; 3 Chit. Pl. 985; St. Pl. 361, &amp;c.; Id. (Tyler,) 323, &amp;c.)

*Title of Court* Circuit Court for A County, to wit:  
*and Rules.* — Rules, 18—.

*Statement of* D. D. And the said defendant, by his attorney, comes and  
*Defence.* ads. says that he did pay the arrears of the said annuity  
 C. C. to the said A, and did well and sufficiently save, protect,  
 and defend, keep harmless and indemnify the said —, and  
 his personal representatives, and his and their goods, estates, and  
 effects from and against the payment of the money mentioned in  
 the said indenture in the said declaration mentioned, and from and  
 against all actions, suits, claims, or demands for or upon account  
 of the same, according to the tenor and effect, true intent and  
*Conclusion.* meaning of the said covenants in the said indenture contained.  
*To the country.* And of this the said defendant puts himself upon the country.

T. M. McC., p. d.

217. *Plea of Conditions Performed Generally.*

(Ante, p. 896; 3 Chit. Pl. 985; St. Pl. 334, &amp;c., 359, &amp;c.; Id. (Tyler,) 321, &amp;c.)

*Title of Court* Circuit Court for A County, to wit:  
*and Rules.* — Rules, 18—.

*Statement of* D. D. And the said defendant, by his attorney, comes and  
*Defence.* ads. says that the said defendant did from time to time,  
 C. C. and at all times after the making of the said writing  
 obligatory, and the said condition thereof well and truly, perform,  
 fulfil and keep all and singular the articles, clauses, payments,  
 conditions and agreements, in the said condition of the said writing  
 obligatory specified, comprised and mentioned, in all things  
 therein contained on his part and behalf to be observed, performed,  
 fulfilled and kept, according to the tenor and effect, true intent and  
*Conclusion.* meaning, of the said condition of the said writing obligatory. And  
*Offer to verify.* this the said defendant is ready to verify.

B. McD., p. d.

218. *Plea of Conditions Performed, when Condition Contains Negative, as well as Affirmative, or Disjunctive Stipulations.*

(*Ante*, p. 988-'9, 1005; 3 Chit. Pl. 986; St. Pl. 365; Id. (Tyler,) 324, &c.)

*Title of Court* Circuit Court for A County, to wit:  
*and Rules.* — Rules, 18—.

*Statement of* D. D. And the said defendant, by his attorney, comes  
*Defence.* ads. and says that he did &c. [*alleging that defendant did*  
*Observance, &c.* C. C. *not do any of the acts stipulated against in the words of*  
*of Negative the condition, and then, proceeding to the alternative or disjunctive*  
*Covenants. covenants, say*]: and the said defendant in fact says, that after  
*Perform'ce of* the making of the said writing obligatory, to wit, on the — day of  
*Alter. Cov'ts,* —, in the year of our Lord eighteen hundred and —, he did, &c.  
*or of Dis-* [*Stating performance by defendant of alternative covenants; i. e.*  
*junctive. that he did one or the other of the acts which he had the option to per-*  
*Performance* affirmative covenants as follows:] And the said defendant further  
*of Affirmative* says that he did, from time to time, and at all times after the mak-  
*Covenants.* ing of the said writing obligatory, well and truly observe, per-  
form, fulfil and keep all and singular other the articles, clauses,  
payments, conditions and agreements in the said condition of the  
said writing obligatory, specified, comprised, or mentioned, in all  
things therein contained on his part and behalf to be observed,  
performed, fulfilled and kept, according to the tenor and effect,  
*Conclusion.* true intent and meaning of the said condition of the said writing  
*Offer to verify.* obligatory. And this the said defendant is ready to verify.

E. A. McD., p. q.

See V. C. 1873, c. 167, § 29, 25.

If *oyer* of bond and condition are required, it must be craved according to Form, 214, *Ante*, p. 1468.

219. *Plea of Performance of Covenants, in a Separate Indenture or Writing Contained.*

(*Ante*, p. 988, 1005, &c.; 3 Chit. Pl. 987; St. Pl. 363; Id. (Tyler) 323.)

*Title of Court* Circuit Court for A County, to wit:  
*and Rules.* — Rules, 18—.

*Statement of* D. D. And the said defendant, by his attorney, comes  
*Defence.* ads. and says that there was not nor is there any negative  
C. C. or disjunctive covenant or agreement contained or  
specified in the said indenture [*or writing,*] in the said condition of  
the said writing obligatory mentioned on the part or behalf of the  
said defendant to be omitted, done, observed, performed, fulfilled  
or kept, and that the said defendant hath well and truly performed,  
fulfilled, and kept the said last mentioned indenture, and all things  
therein contained, on his part and behalf to be observed, performed,  
*Conclusion.* fulfilled and kept, according to the true intent and meaning  
*Offer to verify.* thereof. And this the said defendant is ready to verify.

W. C. McG., p. d.

See V. C. 1873, c. 167, § 29, 55.

For *oyer* of bond and condition, when required, &c. *Ante*, p. 1468, Form 214.

220. *Plea in Excuse of Performance.*

(See 3 Chit. Pl. 688-'9.)

221. *Plea of Set-off, of Open Account to Debt on Bond.*

(*Ante*, p. 655, &c.; 3 Chit. Pl. 956; V. C. 1873, c. 168, § 4, &c.)

<i>Title of Court and Rules.</i>	Circuit Court for A County, to wit: — Rules, 18—.
<i>Statement of Defence.</i>	D. D. And the said defendant, by his attorney, comes ads. and says that before and at the time of the com- C. C. mencement of this suit, the said plaintiff was and
<i>Indebtedness of Plaintiff.</i>	still is indebted to the said defendant in a large sum of money, to wit, the sum of ——— dollars, for divers goods, wares, and merchandise by the said defendant before that time sold and delivered to the said plaintiff, and at his special instance and request, and being so indebted, the said plaintiff, in consideration thereof, afterwards, to wit, on the — day of —, in the year of our Lord eighteen hundred and —, [any day before the commencement of the suit,] promised the said defendant, and agreed that he would pay the said defendant the said sum of ——— dollars, first above mentioned, whenever he, the said plaintiff, should be thereunto afterwards requested, [or otherwise settling out the cause of action according to the fact, as in a declaration, observing that the demand of defendant must be a debt, certain or capable of being made certain.] And the said defendant avers that the said sum of money,
<i>Promise of Pl'tf to pay.</i>	so due and owing from the said plaintiff to the said defendant, is still in arrear and unpaid; and he, the said defendant, is ready and willing, and hereby offers, according to the form of the statute in such case made and provided, to set-off and allow the same against the sum of money remaining due and payable by force of the said
<i>Debt still owing from Pl'tf.</i>	writing obligatory, And this the said defendant is ready to verify.
<i>Offer to set it off.</i>	J. D. M., p. d.
<i>Conclusion.</i>	
<i>Offer to verify.</i>	

See V. C. 1873, c. 167, § 29, 25. *Ante*.

For *oyer* of bond and condition when required, (which is only when the bond is penal or with condition, and the penalty or condition is not plainly set out in the declaration.) See *Ante*, p. 1468, Form 214.

222. *Pleas of Set-off of Bond and Promissory Note, to Debt on Bond.*

(*Ante*, p. 635; 3 Chit. Pl. 956 a, 968 b, 936 a, 938.)

<i>Title of Court and Rules.</i>	Circuit Court for A County, to wit: — Rules, 18—.
<i>Statement of Defence.</i>	D. D. And the said defendant, by his attorney, comes and ads. says that, before and at the time of the commence- C. C. ment of this suit, the said plaintiff was and still is in-
<i>1st Count, Bond of Pl'tf to Defendant.</i>	debted to the said defendant in a large sum of money, to wit, the sum of ——— dollars, [enough to cover the set-off claimed, whether more or less than the sum claimed by plaintiff in his declaration as due from defendant.] upon and by virtue of a certain writing obligatory, made by the said plaintiff heretofore, to wit, on the — day of —, in the year of our Lord eighteen hundred and —, sealed with his seal,

and now here to the court shown, the date whereof is the day and year last aforesaid, whereby he, the said plaintiff, became and was held and firmly bound unto the said defendant in the penal sum of — dollars, to be paid to the said defendant when he, the said plaintiff, should be thereunto afterwards requested; which said writing obligatory was and is conditioned for the payment of a certain sum of money, to wit, the sum of — dollars, at a certain time therein mentioned, and which had elapsed before the commencement of this suit, and which said writing obligatory, at the time of the commencement of this suit, was and still is in full force and effect, not released, paid off, satisfied, or otherwise discharged; and at the time of the commencement of this suit, there was and still is due and owing from the said plaintiff to the said defendant, upon the said writing obligatory, by the condition thereof, a certain sum of money, to wit, the sum of — dollars aforesaid [*the sum first alleged to be due*]. Which said sum of money so due and owing from the said plaintiff to the said defendant, exceeds the supposed debt due and owing from the said defendant to the said plaintiff, and the damages sustained by the said plaintiff, by reason of the detention of the said supposed debt, so alleged to be due and owing to the said plaintiff, as in the said declaration mentioned, and out of which said sum of money, so due and owing from the said plaintiff to the said defendant, he, the said defendant, is ready and willing, and hereby offers to set-off and allow to the said plaintiff, the full amount of the said supposed debt and damages, according to the form of the statute in such case made and provided. And this the said defendant is ready to verify.

Offer to set  
off the Bond.

2nd Plea,  
Promissory  
Note of Plt'ff  
to Defendant.

And for a further plea in this behalf the said defendant says, that the said plaintiff, before and at the time of the commencement of this suit was and still is, indebted to the said defendant in a further large sum of money, to wit, the sum of — dollars, upon and by virtue of a certain promissory note in writing, bearing date on the — day of —, in the year of our Lord eighteen hundred and —, made by the said plaintiff, and whereby he, the said plaintiff, then and there promised and agreed to pay — months after the date thereof, to the said defendant, the said sum of — dollars, for value received, which said promissory note, at the time of the commencement of this suit, was and still is in full force and effect, not released, paid off, nor in any wise discharged; and at the time of the commencement of this suit, there was and still is due and owing from the said plaintiff to the said defendant upon the said promissory note, a certain sum of money, to wit, the said sum of — dollars, [*the sum in this plea first alleged to be due*]; which said sum of money, so due and owing from the said plaintiff to the said defendant, is wholly unpaid, and exceeds the money so due and owing from the said defendant to the said plaintiff, by virtue of the said writing obligatory in the said declaration mentioned, and which said sum of money so due and owing from the said plaintiff to the said defendant as aforesaid, or so much thereof

Offer to Set-off  
the Promis.  
Note.

as shall be necessary in this behalf, he, the said defendant, is ready and willing, and hereby offers to set-off and allow against the said sum of money so as aforesaid supposed to be due and payable by

*Conclusion.* virtue of the said writing obligatory, according to the form of the Offer to verify. statute in such case made and provided. And this the said defendant is ready to verify.

O. P. M., p. d.

¶ If the amount of the set-off be less than the debt claimed by the plaintiff, the plea should show how much of the action it *proposes to answer*, and to that end should have an *actio. non*, which of course makes a *prayer of judgment* proper. *Ante*, p. 1467; St. Pl. 215-'16; Id. (Tyler,) 215; Hunt's Adm'r v. Martin's Adm'r, 8 Grat. 578; V. C. 1873, c. 168, § 8; St. Pl. 396, 403; Id. (Tyler,) 345, 350.)

If the amount of set-off exceeds the plaintiff's demand, judgment for excess may be rendered for defendant. V. C. c. 168, § 9.

223. *Special Plea in the nature of a Plea of Set-off, for Breach of Warranty, &c., to Action of Debt on Bond.*

(*Ante*, p. 661 & seq. 666.)

<i>Title of Court and Rules.</i>	Circuit Court for A County, to wit: — Rules, 18—.
<i>Statement of Defence.</i>	D. D. And the said defendant, by his attorney, comes ada. and says that before the making of the said writing C. O. obligatory in the said declaration mentioned, to wit, on the — day of —, in the year of our Lord eighteen hundred and —, the said plaintiff, in consideration that the said defendant would buy of the said plaintiff a certain horse, at and for a certain price, to wit, the sum of — dollars, to be therefore paid by the said defendant to the said plaintiff, under- took and then and there faithfully promised the said defendant that the said horse then was sound, and that he, the said plaintiff, then had a good, perfect, and indefeasible title to the said horse, and a perfect right to sell the same. And the said defendant averts that he, confiding in the said promise and undertaking of the said plaintiff, did afterwards, to wit, on the day and year last afore- said, buy the said horse of the said plaintiff, and did then execute and deliver to the said plaintiff the said writing obligatory, whereon this action is founded, for the price aforesaid of the said horse, and there was no other cause, inducement, or consideration what- soever for the making of the said writing obligatory. And the said defendant further says that the said plaintiff did not perform, fulfil or regard his said promise and undertaking, but therein wholly failed and made default in this, that the said horse, at the time of the making of the said promise and undertaking of the said plaintiff, was not sound, but on the contrary thereof, was un- sound; and moreover that the said plaintiff had not at that time, or at any time afterwards, a good, perfect, and indefeasible title to the said horse, and a perfect right to sell the same, but on the contrary thereof, the said horse was then the lawful and rightful property of another person, to wit, of one J. S., by whom the said horse afterwards, to wit, on the — day of —, in the year of our Lord eighteen hundred and —, was by due pro-
<i>Agreement for horse.</i>	
<i>Warranty of soundness.</i>	
<i>Of title.</i>	
<i>Bond on that consideration alone.</i>	
<i>Breach of warranty.</i>	
<i>As to soundness.</i>	
<i>As to title.</i>	



cess of law recovered of and from the said defendant, and thereby became and was wholly lost to the said defendant. So that by reason of the breaches aforesaid of the said plaintiff's promise and undertaking, the said horse became and was of no use nor value to the said defendant. And the said defendant says that by reason of the premises, he hath sustained great loss and damage, amounting in the whole to a large sum of money, to wit, to the sum of ——— dollars, of all which the said defendant afterwards, to wit, on the day and year last aforesaid, had notice. And the said defendant says that the said damages, amounting to the said sum of ——— dollars, are still unpaid, and are now due and owing from the said plaintiff to the said defendant, and the said defendant is ready and willing, and hereby offers, in pursuance of the statute in such case made and provided, to set-off and allow the same against the said sum of money supposed to be due and payable by the said defendant to the said plaintiff, by force and effect of the said supposed writing obligatory upon which this action is founded.

**Damage to Defendant.**

**Notice.**

**Offer to set off.**

**Conclusion.**

**Offer to verify.** And this the said defendant is ready to verify.

F. O. M., p. d.

**Affidavit.** As *Ante*, p. 1460; See V. C. 1873, c. 168, § 5.

See V. C. 1873, c. 167, § 29, 25. *Ante*, p. 1467, as to Formal Defence, *actio non*, and Prayer of Judgment.

If the damages claimed are less than the sum demanded by the plaintiff, the plea should begin with an *actio non*, and conclude with a *prayer of judgment*. (V. C. 1873, c. 168, § 8; *Ante*, p. 637, &c.) And when, on the other hand, the jury allows the defendant upon his plea, damages *exceeding* the claim of the plaintiff, the defendant is to have judgment *for the excess*. *Ante*, p. 660, 662; V. C. 1873, c. 168, § 9.

## 224. *Plea of the Statute of Limitations to Simple Contract.*

(*Ante*, p. 667, & seq; 3 Ohit. Pl. 956 a; V. C. 1873, c. 146, § 8, 9.)

**Title of Court and Rules.** Circuit Court for A County, to wit: — Rules, 18—.

**Statement of Defence.**

D. D. And the said defendant, by his attorney, comes ads. and says that the said several supposed causes of action in the said declaration mentioned, [or if there be but one, say "*the said supposed cause of action*," &c.,] did not, nor did any or either of them [if there be but one, omit "*nor did any or either of them*," ] accrue to the said plaintiff at any time within — years next before the commencement of this suit, in manner and form as the said plaintiff hath above thereof complained.

**Conclusion.**

**Offer to verify.** against him. And this the said defendant is ready to verify.

H. G. M., p. d.

See V. C. 1873, c. 167, § 29, 25: *Ante*, p. 1467.

225. *Plea of Statute of Limitations to Store Account.*(V. C. 1873, c. 146, § 8; *Ante*, p. 688-'9.)

*Title of Court and Rules.* Circuit Court for A County, to-wit:  
— Rules, 18—.

*Statement of Defence.* D. D. And the said defendant comes and says, that the  
ads. supposed cause of action in the said declaration men-  
O. C. tioned was for articles charged in a store account,  
and that the same did not accrue to the said plaintiff at any time  
*Conclusion.* within two years next before the commencement of this suit. And  
*Offer to verify.* this the said defendant is ready to verify.

L. F. N., p. d.

226. *Plea of Statute of Limitations to a Specialty.*

Essentially the same in form as a plea of the statute to a simple contract, except that the *time of limitation* to indemnifying bonds, and the bonds of public officers and fiduciaries, is ten years, and to other specialties twenty years.

V. C. 1873, c. 146, § 8.

227. *Plea of Infancy to Debt on a Bond.*

(3 Chit. Pl. 965.)

*Title of Court and Rules.* Circuit Court for A County, to wit:  
— Rules, 18—.

*Statement of Defence.* D. D. And the said defendant, by his attorney, comes  
ads. and says that, at the time of the making of the said  
O. C. supposed writing obligatory, in the said declaration  
mentioned, the said defendant was an infant, within the age of  
*Conclusion.* twenty-one years, to wit, of the age of — years. And this the  
*Offer to verify.* said defendant is ready to verify.

E. W. O., p. d.

See V. C. 1873, c. 167, § 25, 29; *Ante*, p. 1467.228. *Plea of Coverture to Debt on a Bond.*

*Title of Court and Rules.* Circuit Court for A County, to wit:  
— Rules, 18—.

*Statement of Defence.* D. D. And the said defendant comes and says that, at the  
ads. time of the making of the said supposed writing ob-  
O. C. ligatory, in the said declaration mentioned, the said  
*Conclusion.* defendant was and yet is a married woman, the wife of one J. D.  
*Offer to verify.* And this the said defendant is ready to verify.

W. S. P., p. d.

See 3 Chit. Pl. 966; V. C. 1873, c. 167, § 29, 25; *Ante*, p. 1467.

229. *Plea of Usury to Debt on Bond.**Ante*, p. 990-'91; V. C. 1873, c. 137, § 8.

*Title of Court and Rules.* Circuit Court for A County, to wit:  
— Rules, 18—.

*Statement of Defence.* D. D. And the said defendant, by his attorney, comes  
ads. and says that the said supposed writing obligatory  
C. C. in the said declaration mentioned, was for the pay-  
*Conclusion.* ment of interest at a greater rate than is allowed by law. And this  
Offer to verify. the said defendant is ready to verify.

D. A. P., p. d.

See V. C. 1873, c. 167, § 29, 25; *Ante*, p. 1467.

At common law, the plea of usury must have set out, with precision and accuracy, the particulars of the usurious contract, including the *exact rate per cent*.

See 3 Chit. Pl. 966; St. Pl. 338; Id. (Tyler,) 307-'8.

230. *Plea to Debt on Bond, that it was for Money won by Gaming.*

*Title of Court and Rules.* Circuit Court for A County, to wit:  
— Rules, 18—.

*Statement of Defence.* D. D. And the said defendant, by his attorney, comes  
ads. and says that the consideration of the said supposed  
C. C. writing obligatory, in the said declaration mentioned,  
was [if in part only, say "*in part*,"] money [or "*property*," &c.,  
as the case may be,] which the said plaintiff, before the making of  
the said writing obligatory, to wit, on the — day of —, in  
the year of our Lord eighteen hundred and —, won of the said  
defendant, at a certain game with cards, [or "*dice*,"] called —,  
[or *whatever game, sport, pastime, or wager it may have been*.] And  
this the said defendant is ready to verify,

F. R., p. d.

See V. C. 1873, c. 167, § 29, 25; *Ante*, p. 1467.

Our statute avoids all contracts, conveyances, or assurances of which the consideration, or any part thereof, is money, property, or other thing *won or bet* at any game, sport, or pastime, or wager, or money *lent or advanced* at the time of any gaming, betting, or wagering, to be used in being so bet or wagered, where the person lending or advancing it knows that it is to be so used.

See V. C. 1873, c. 139, § 2.

231. *Plea to Debt on Bond, that it was for Money Bet at Gaming.*

*Title of Court and Rules.* Circuit Court for A County, to-wit:  
— Rules, 18—.

*Statement of Defence.* D. D. And the said defendant, by his attorney, comes  
ads. and says that the consideration of the said supposed  
C. C. writing obligatory, in the said declaration mentioned,  
was [if in part only, say "*in part*,"] money [or "*property*," &c.,  
as the case may be,] which the said plaintiff, before the making of

the said writing obligatory, to wit, on the — day of —, in the year of our Lord eighteen hundred and —,\* had bet with the said defendant, and which the said defendant had then lost to the said plaintiff, by betting at a certain game with cards, [or “dice,”] called —, [or *whatever game, sport, or wager, or pastime, it may have been*]. And this the said defendant is ready to verify.

O. B. R., p. d.

232. *Plea to Debt on Bond, that it was for Money lent for Gaming.*

*Title of Court, and Rules.* Circuit Court for A County, to wit: — Rules, 18—.

*Statement of Defence.* D. D. Pursus Form 231 down to \*, and then proceed thus :  
ads. had lent and advanced, to the said defendant, to be  
C. C. used in gaming, at the time of such gaming, and  
when the said plaintiff knew that it was to be so used, [if to be used  
in betting, say “to be used in betting on a certain [whatever game,  
Conclusion. sport, pastime, or wager it was,] at the time of such betting, and  
Offer to verify. when the said plaintiff knew that it was to be so used.”] And this  
the said defendant is ready to verify.

J. S. R., p. d.

233. *Plea of Release to Debt on Bond.*

(3 Chit. Pl. 930.)

*Title of Court and Rules.* Circuit Court for A County, to-wit: — Rules, 18—.

D. D. And the said defendant, by his attorney, comes  
ads. and says, that after the making of the said supposed  
C. C. writing obligatory in the said declaration mentioned,  
[or, “of the said several promises and undertakings in the said declaration mentioned,” if the action were assumpsit], and before the commencement of this suit, to wit, on the — day of —, in the year of our Lord eighteen hundred and —, the said plaintiff, by his certain writing of release, sealed with his seal, and now to the court here shown, the date whereof is the day and year aforesaid, did remise, release and for ever quit-claim unto the said defendant, the said supposed writing obligatory, and all sums of money then due and owing, and thereafter to become due, together with all manner of actions, and causes of action, controversies, trespasses, damages and demands whatever, both at law and in equity, or otherwise, however, which the said plaintiff then had, or might at any time thereafter have, claim or allege against the said defendant, by reason or by means of any matter, cause or thing, from the beginning of the world to the day of the date of the said writing of release, as by the said writing, reference being thereunto had, will more fully appear. And this the said defendant is ready to verify.

G. S. S., p. p.

234. *Plea of Statute of Parol Agreements, in Action on a Guaranty.*

(8 Chit. Pl. 909; V. C. 1873, c. 140, § 1.)

*Title of Court and Rules.* Circuit Court for A County, to wit:  
— Rules, 18—.

D. D. And the said defendant, by his attorney, comes  
ads. and says, that the said several supposed promises

O. O. and undertakings in the said declaration [or "*in the said first and second counts of the said declaration respectively*"] mentioned, were and each of them was, a promise to answer for the debt of another person, to wit, of the said —, and that no agreement or promise in respect of or relating to the said supposed causes of action in the said declaration [or "*in the said first and second counts of the said declaration respectively*"] mentioned, or to either of them, nor any memorandum or note thereof, was or is in writing, or was or is signed by the said defendant, or his agent,

*Conclusion.* according to the form of the statute in such case made and pro-  
*Offer to verify.* vided. And this the said defendant is ready to verify.

H. O. S., p. d.

See V. C. 1873, c. 167, § 29, 25; *Ante*, p. 1467.235. *Plea of Accord and Satisfaction in Assumpsit. A Bond given in Satisfaction.*

(8 Chit. Pl. 925.)

*Title of Court and Rules.* Circuit Court for A County, to wit:  
— Rules, 18—.

D. D. And the said defendant, by his attorney, comes  
ads. and says, that after the making of the said several

*Statement of Defence.* O. O. promises and undertakings in the said declaration mentioned, and before the commencement of this suit, to wit, on the — day of —, in the year of our Lord eighteen hundred and —, the said defendant made and sealed, and as his act and deed delivered, to the said plaintiff, his, the said defendant's, writing obligatory, sealed with his seal, for the payment of — dollars, by the said defendant to the said plaintiff, at a certain time therein mentioned, and now elapsed, and which said writing obligatory the said defendant then and there delivered to the said plaintiff, and the said plaintiff then and there accepted and received the same of and from the said defendant, in full satisfaction and discharge of the said several promises and undertakings in the said declaration mentioned, and of all damages and  
*Conclusion.* sums of money thereupon due and owing, or accrued. And this  
*Offer to verify.* the said defendant is ready to verify.

R. F. S., p. d.

See V. C. 1873, c. 167, § 29, 25; *Ante*, p. 1467.

236. *Pleas of Duress per Minas, &c.*

(3 Chit. Pl. 964.)

- Title of Court and Rules.** Circuit Court for A County, to wit: — Rules 18 —.
- Statement of Defence.** D. D. And the said defendant, by his attorney, comes ads. and says that the said plaintiff, just before the making of the said supposed writing obligatory in the said declaration mentioned, to wit, on the — day of —, in the year of our Lord eighteen hundred and —, menaced and threatened the life of the said defendant, unless the said defendant would make and seal, and as his act and deed deliver the said writing in the said declaration mentioned; and the said defendant did then and there, by reason and in consequence of such menaces and threats, and in fear and apprehension thereof, make and seal, and as his act and deed deliver the writing obligatory aforesaid.
- Conclusion.** Offer to verify. And this the said defendant is ready to verify.
- 2nd Plea.** And for a further plea in this behalf, the said defendant says that the said plaintiff, just before the making of the said supposed writing obligatory in the said declaration mentioned, to wit, on the — day of —, in the year of our Lord eighteen hundred and —, assaulted, beat, bruised and wounded the said defendant, and menaced and threatened further to beat, bruise and wound the said defendant, unless the said defendant would make and seal, and as his act and deed deliver the said supposed writing obligatory in the said declaration mentioned; and the said defendant did thereupon, therefore, and through fear of losing his life, on that occasion, make and seal, and as his act and deed deliver the said writing.
- Statement of Defence.** Offer to verify. And this the said defendant is ready to verify.
- 3rd Plea.** And for a further plea in this behalf, the said defendant says that the said plaintiff, just before the making of the said supposed writing obligatory in the said declaration mentioned, to wit, on the — day of —, in the year of our Lord eighteen hundred and —, assaulted, beat, bruised and wounded the said defendant, and also menaced and threatened further to beat, bruise and wound the said defendant, unless the said defendant would make and seal, and as his act and deed, deliver his said supposed writing obligatory in the said declaration mentioned; and the said defendant then, by reason and in consequence of the premises in this plea mentioned, and for fear of further wounding, and of mayhem, and on no other account whatsoever, did make and seal, and as his act and deed, deliver the said writing. And this the said defendant is ready to verify.
- Statement of Defence.** Offer to verify. And this the said defendant is ready to verify.
- Assault and fear of Mayhem.**
- Conclusion.** Offer to verify. And this the said defendant is ready to verify.
- 4th Plea.** And for a further plea in this behalf, the said defendant says that, at the time of the making of the said supposed writing obligatory in the said declaration mentioned, to wit, on the — day of —, in the year of our Lord eighteen hundred and —, the said defendant was unlawfully imprisoned by the said plaintiff, [and others in collusion with him], and then detained in prison, until by the force and duress of such imprisonment of him, the said

*Conclusion.* defendant, the said defendant made the said supposed writing  
*Offer to verify.* obligatory, and delivered the same to the said plaintiff as his deed.  
 And this the said defendant is ready to verify.

G. E. S., d.

See V. C. 1873, c. 167, § 29, 25; *Ante*, p. 1467.

### 237. *Plea of Tender.*

(3 Chit. Pl. 955.)

*Title of Court and Rules.* Circuit Court for A County, to wit :  
 — Rules, 18—.

*Statement of Defence.* D. D. And the said defendant, by his attorney, comes  
 ads. and says that *the said plaintiff ought not to have or*  
 U. C. *maintain his action aforesaid thereof against him to*  
*Actio. non.* *recover any damages or interest by reason of the non-payment of the*  
*said sum of ——— dollars in the said declaration mentioned, because*  
*he says, that the said defendant, on the day when the said sum be-*  
*came due and payable, to wit, on the ——— day of ———, in the*  
*year of our Lord eighteen hundred and ———, was ready and will-*  
*ing, and then tendered and offered to pay to the said plaintiff the*  
*said sum of ——— dollars, to receive which of the said defendant*  
*the said plaintiff then wholly refused; and the said defendant avers*  
*that from thence hitherto, he hath been and still is ready to pay to*  
*the said plaintiff the said sum of ——— dollars, and the said de-*  
*fendant now brings the same into court here, ready to be paid to*  
*Conclusion.* *the said plaintiff if he will accept the same. And this the said de-*  
*Offer to verify.* *fendant is ready to verify. Wherefore he prays judgment if the said*  
*Prayer of* *plaintiff ought to have or maintain his action aforesaid thereof*  
*Judgment.* *against him as to any damages or interest by reason of the non-pay-*  
*ment of the said sum of ——— dollars.*

C. A. S., p. d.

See V. C. 1873, c. 167, § 29; *Ante*, p. 1467.

The *actionem non* and prayer of judgment are retained, because the plea does not go to the *whole action*, but only to the *damages and interest*. See St. Pl. 396, 408; *Ante*, p. 637, 639.

It is usual to plead tender along with some other plea, *e. g. nil debet, non-assumpsit*, or *payment, &c.*, as to part, and tender as to the residue. This form may be easily adapted to that mode of pleading by reference to 3 Chit. Pl. 955; thus:

*Title of Court, and Rules.* Circuit Court for A County, to wit :  
 — Rules, 18—.

*Statement of Defence.* D. D. And the said defendant, by his attorney, comes  
 ads. and says, that except as to the sum of ——— dollars,  
 U. C. [*the sum tendered,*] parcel of the sum in the said  
*Nil debet.* declaration demanded, the said defendant does not owe the same,  
 or any part thereof, to the said plaintiff in manner and form as the  
 said plaintiff hath above thereof complained against him; and of  
*Conclusion.* this the said defendant puts himself upon the country.  
*2nd Plea.* And for a further plea in this behalf, the said defendant says,  
 that as to the said sum of ——— dollars, [*the sum tendered,*] parcel

of the sum in the said declaration demanded, the said defendant says, that the said plaintiff ought not to have or maintain his action aforesaid thereof against him, to recover any damages or interest, &c, [as in the Form No. 287.]

**NOTE**—That the tender must be alleged to have been made on the *very day* the money became due.

See *Ante*, 611 ; Chit. Cont. 796 & n (1) ; Bac. Abr. Tender, (D) and (H) 1, 2, 3.

### 238. *Plea of Alien Enemy, at the Making of Contract.*

(3 Chit. Pl. 911.)

*Title of Court and Rules.* Circuit Court for A County, to wit: — Rules, 18—.

*Statement of Defence.* D. D. And the said defendant, by his attorney, comes  
ads. and says, that the said plaintiff is an alien, born in  
C. C. foreign parts, out of the allegiance of this Commonwealth, and of the United States, and within the allegiance of a foreign State, to wit, in the kingdom of —, and is not a subject of the United States, or of this Commonwealth, by naturalization or otherwise ; and the said defendant further says that, at the time of the making of the said supposed promises and undertakings [or if the action be *debt on bond*, say—“*of the said supposed writing obligatory*”], in the said declaration mentioned, the persons exercising the powers of government in the said foreign State of —, were and still are at war with, and enemies of the said United States, and the said Commonwealth of Virginia ; and that the said plaintiff, so being alien born, and such enemy as aforesaid, was and still is adhering to the said enemies of the said United States, and of the said Commonwealth. And this the said

*Conclusion.*

*Offer to verify.* defendant is ready to verify.

N. B. S., p. d.

See V. C. 1873, c. 167 § 29, 25 ; *Ante*, p. 1467.

### 239. *Plea of Plene Administravit.*

(3 Chit. Pl. 944.)

*Title of Court and Rules.* Circuit Court for A County, to wit: — Rules, 18—.

*Statement of Defence.* D. D. And the said defendant, by his attorney, comes  
ads. and says, that he hath fully administered all and  
C. C. singular the goods and chattels, rights and credits which were of the said J. S., deceased, at the time of his death, and which have ever come to the hands of the said defendant, as executor or [“*as administrator*”] of the said J. S., to be administered ; and that the said defendant hath not, nor at the time of the commencement of this suit, nor at any time, had any goods, chattels or credits which were of the said J. S., deceased, at the time of his death, in the hands of the said defendant, as executor [or as “*administrator*”] as aforesaid to be administered. And this

*Conclusion.*

*Offer to verify.* the said defendant is ready to verify.

R. H. S., p. d.

See V. C. 1873, c. 167, § 29, 25 ; *Ante*, p. 1467.



240. *Plea of Plene Administravit Præter.*

(3 Chit. Pl. 945.)

<i>Title of Court and Rules.</i>	Circuit Court for A County, to wit: — Rules, 18—.
<i>Statement of Defence.</i>	D. D. And the said defendant, by his attorney, comes ads. and says, that the said plaintiff ought not to have or
<i>Actio. non.</i>	C. C. maintain his action aforesaid thereof against him, except as to the sum of — dollars, because he says that the said defendant hath fully administered all and singular the goods and chattels, rights and credits which were of the said E. F., deceased, at the time of his death, and which have ever come to the hands of the said defendant as executor, [or “as administrator,”] as aforesaid of the said E. F., deceased, to be administered, except goods and chattels of the value of — dollars, [or “except the sum of — dollars,”] and that the said defendant hath not now, nor at the commencement of this suit, or at any time since, had any goods and chattels which were of the said E. F., deceased, at the time of his death in his hands to be administered, except the said goods and chattels of the value aforesaid, [or “the said sum of — dollars.”] And this the said defendant is ready to verify.
<i>Conclusion.</i>	Wherefore he prays judgment, whether the said plaintiff ought to have or maintain his action aforesaid thereof against him, except as to the said sum of — dollars.
<i>Offer to verify.</i>	
<i>Prayer of Judgment.</i>	

G. B. S., p. d.

See V. C. 1873, c. 167, § 29. *Actionem non* and prayer of judgment retained, because the plea does not go to the whole action. (St. Pl. 396, 403; Id. (Tyler), 350, 262; *Ante*, p. 637, 639.)

241. *Plea of Plene Administravit Præter, Excepting enough Assets to pay Debts of Superior Dignity.*

(V. C. 1873, c. 126, § 25; 3 Chit. Pl. 947)

<i>Title of Court and Rules.</i>	Circuit Court for A County, to wit: — Rules, 18—.
<i>Statement of Defence.</i>	D. D. And the said defendant, by his attorney, comes ads. and says that heretofore, and in the life-time of the said E. F., now deceased, the said E. F. was justly indebted to the United States of America in a large sum of money, to wit, the sum of — dollars, which at the time of the death of the said E. F. was and still is due and unpaid. And the said defendant further says, that heretofore, and in the life-time of the said E. F., he, the said E. F., was justly indebted to the Commonwealth of Virginia in a large sum of money, to wit, the further sum of — dollars, for taxes, [or “to the county of —,” (V. C. 1873, c. 53, § 33; Id. c. 37,) for levies,”] lawfully assessed upon the said E. F. previous to his death, which said sum of — dollars, at the time of the death of the said E. F., was and still is due and unpaid. And the said defendant says further, that heretofore, and in the life-time of the said E. F., he, the said E. F., was the executor of the last will and testament of one G. H., deceased, and as such quali-
<i>Debt due United States.</i>	
<i>Taxes due Virginia.</i>	
<i>Debt due as Personal Rep.</i>	

fled according to law, in the — court of — county, [or *administration of all and singular the goods and chattels, rights and credits which were of one G. H., deceased, at the time of his death, who died intestate, by the — court of — county, in due form of law was granted to the said E. F.,*] and that there was justly due from the said E. F. in his life-time, as executor [or "*as administrator,*" ] as aforesaid, a large sum of money, to wit, the sum of — dollars, which at the time of the death of the said E. F. was and still is due and unpaid. And the said defendant further says, that he hath fully administered all and singular the goods and chattels which were of the said E. F., deceased, at the time of his death, which have ever come to his hands to be administered, except goods and chattels of small value, to wit, of the value of — dollars; and that he, the said defendant, hath not, nor at the time of the commencement of this suit, or at any time since, hath had any goods and chattels which were of the said E. F. at the time of his death in his hands to be administered, except the said goods and chattels of the value aforesaid, which are not sufficient to satisfy the several debts aforesaid, and which are subject and liable to satisfy the said several debts. And this the said defendant is ready to verify.

Plene Admin-  
istravit.

Proster.

Conclusion.

Offer to verify.

J. S., p. d.

See V. C. 1873, c. 167, § 29, 25; *Ante*, p. 1467.

#### 242. *Plea of Nul Tiel Record.*

(3 Chit. Pl. 994.)

*Title of Court and Rules.* Circuit Court for A County.  
 — Rules, 18—.

*Statement of Defence.* D. D. And the said defendant, by his attorney, comes  
 and says, that there is not any record of the said sup-  
 posed recognizance, [or if in debt upon a judgment,  
 say "*of the said supposed recovery,*" ] in the declaration mentioned,  
 remaining in the said — court of — county, in manner and  
 form as the said plaintiff hath above in his said declaration alleged.

*Conclusion.* And this the said defendant is ready to verify.

*Offer to verify.*

W. C. S., p. d.

See V. C. 1873, c. 167, § 29, 25; *Ante*, p. 1467,

#### FORMS OF REPLICATIONS.

#### 243. *Replication to Plea to the Jurisdiction.—Cause of Action arose in County, &c.*

(See St. Pl. 399, 105; Id. (Tyler) 345, 133; 1 Chit. Pl. 499, 678; *Ante*, p. 1025 & seq.; 5 Rob. Prac. 124.)

*Title of Court and Rules.* Circuit Court for A County, to wit:  
 — Rules, 18—.

*Precludi-non.* C. C. And the said plaintiff, by his attorney, comes and  
 vs. says, that notwithstanding any thing by the said de-  
*Ans. to Plea.* D. D. fendant in his said plea alleged, this court ought not



246. *Replication to Plea in Abatement, for Variance between the Writ and Declaration.*

(*Ante*. p. 1027.)

<i>Title of Court and Rules.</i>	Circuit Court for A. County, to wit: — Rules 18—.
<i>Cassari Non.</i>	C. C. And the said plaintiff, by his attorney, comes and vs. says that by reason of anything by the said defendant D. D. in his said plea above alleged, the said writ and declaration ought not to be quashed, because he says that there is no variance between the said writ and declaration in manner and form as the said defendant hath above in his said plea alleged. And this the said plaintiff prays may be inquired To the country. of by the country.

N. S. T., p. q.

See *Ante* p. 1484, Form 243.

247. *Replication to Plea in Abatement, for Non-joinder of Co-Contractor.*

(3 Chit. PL 1142; *Ante* p. 1027.)

<i>Title of Court and Rules.</i>	Circuit Court for A County, to wit: — Rules 18—.
<i>Cassari Non.</i>	C. C. And the said plaintiff, by his attorney, comes and vs. says that, by reason of anything by the said defendant in his said plea above alleged, the said declaration ought not to be quashed, because he says that the said several promises and undertakings of the said defendant were not made by the said defendant jointly and together with the said J. S. in manner and form as the said defendant hath above in his said plea in that behalf alleged. And this the said plaintiff prays may To the country. be inquired of by the country.

D. G. W., p. q.

248. *Replication to a Common Traverse—Similiter.*

(St. PL 52, 57, 394, &c.; Id. (Tyler,) 93.)

<i>Title of Court and Rules.</i>	Circuit Court for A County, to wit: — Rules, 18—.
<i>Similiter.</i>	C. O. And the said plaintiff as to the said plea by the vs. said defendant above pleaded, and whereof he D. D. hath put himself on the country, doth the like.

W. A. W., p. q.

249. *Replication to General Issue,—Similiter.*

Same as Form 248.

250. *Replication by way of Traverse, to Plea of Infancy.*

(St. Pl. 48, 60.)

*Title of Court and Rules.* Circuit Court for A County, to wit:  
 — Rules, 18—.

C. C. And the said plaintiff comes and says that, at the  
 vs. time of the making of the said writing [or "*the said*  
*Denial of Plea.* D. D. contract" or "*the said promise*," as the case may be]  
 in the said declaration mentioned, the said defendant was not an  
 infant under the age of twenty-one years, in manner and form as  
*Conclusion.* the said defendant hath in his said plea alleged. And this the said  
 plaintiff prays may be inquired of by the country.

J. A. W., p. q.

See V. C. 1873, c. 167, § 25.

251. *Replication to Plea of Infancy by way of Confession and Avoidance.*(8 Chit. Pl. 147-'8; St. Pl. 398, &c.; Id. (Tyler,) 347; *Ante*, p. 670, 1028-'9.)

*Title of Court and Rules.* Circuit Court for A County, to wit:  
 — Rules, 18—.

C. C. And the said plaintiff comes and says, that after  
 vs. the making of the said promises and undertakings [or  
*Answer to Plea.* D. D. "*the said contract*" or "*the said promise*" ] in the  
 said declaration mentioned, and before the commencement of this  
 suit, to wit, on the — day of —, in the year of our Lord  
 eighteen hundred and — [about the day of defendant's attain-  
 ing his age] the said defendant attained his age of twenty-one years,  
 and afterwards and before the commencement of this suit, to wit,  
 on the — day of —, in the year of our Lord eighteen hun-  
 dred and —, assented to, and ratified and confirmed the said  
*Conclusion.* several promises and undertakings in the said declaration men-  
 Offer to verify. tioned. And this the said plaintiff is ready to verify.

A. L. W., p. q.

See V. C. 1873, c. 167, § 25.

252. *Replication by way of Special Traverse, to a Plea of Infancy.*

(Ante, p. 648, 903; St. Pl. 171, 174; Id. (Tyler,) 185, 187.)

Circuit Court for A County, to wit:  
 — Rules, 18—.

C. C. And the said plaintiff, by his attorney, comes and  
 vs. says, that the said writing obligatory in the said  
 D. D. declaration mentioned, was signed, sealed and de-  
 livered, by the said defendant, on the day next preceding the  
 twenty-first anniversary of the said defendant's birth: *Without*  
*this, that* the said defendant was then an infant, within the age of  
 twenty-one years. And this he prays may be inquired of by the  
 country.

J. D. M., p. q.

253. *Replication by New Assignment.*

(Ante, p. 917; 3 Chit. Pl. 1218.)

Circuit Court for A County, to wit:

— Rules, 18—.

C. O. And the said plaintiff says that he brought this action, not for the trespasses in the said [second] plea

vs. D. D. acknowledged to have been done, but for that the said defendant heretofore, to wit, on the — day of —, in the year of our Lord 18—, with force and arms, upon another and different occasion, and for another and different purpose than in the said [second] plea mentioned, made another and different assault upon the said plaintiff than the assault in the said [second] plea mentioned, and then beat, wounded, and ill-treated him in manner and form as the said plaintiff hath above thereof complained; which said trespasses above newly assigned, are other and different trespasses than the said trespass in the said [second] plea acknowledged to have been done. And this the said plaintiff is ready to verify.

E. R. M., p. q.

## FORMS OF REJOINDERS.

## REJOINDERS IN GENERAL.

254. *Similiter to Replication which tenders Issue.*

(3 Chit. Pl. 1219.)

Circuit Court for A County, to wit:

— Rules, 18—.

D. D. And the said defendant, as to the said replication ads. of the said plaintiff to the said [second] plea of the

C. C. said defendant, and which the said plaintiff hath prayed may be inquired of by the country, doth the like.

J. M. McN., p. d.

255. *Rejoinder to Special Replication, which offers to Verify.*

(3 Chit. Pl. 1219.)

Circuit Court for A County, to wit:

— Rules, 18—.

D. D. And the said defendant, as to the said replication ads. of the said plaintiff to the said [second] plea of the

C. C. said defendant, saith that, [here state the subject-matter of the rejoinder; and if it deny the replication, conclude thus]: and of this the said defendant puts himself upon the country.

[If, on the other hand, the rejoinder presents new matter in confession and avoidance, the conclusion should be thus]: And this the said defendant is ready to verify.

O. J. M., p. d.

NOTE.—It will be remembered, that at common law, all pleadings on the part of the defendant—the plea, rejoinder, rebutter, &c.. (except the general issue; and except also *similiter*, which accept an issue tendered), are wont to employ in

what may be called the *commencement*, the allegations of *actionem non*, and in the *conclusion*, (where there is an offer to verify), a *prayer of judgment*. And it will be also remembered, that by statute in Virginia, (in imitation of Rules of Court, Hil. Term, 1834), it is provided that the *actio. non*, and the *prayer of judgment* may be omitted whenever the pleading is *in bar of the whole action*. (*Ante*, p. 637-'8, 670-'71, 672; V. C. 1873, c. 167, § 25.) The form last given follows the statute. At common law, the commencement and conclusion, if we suppose the rejoinder to confess and avoid the replication, would be as follows:

*Commencement*.—And the said defendant, as to the said replication of the said plaintiff to the said [second] plea of the said defendant, saith, that the said plaintiff ought not, by reason of anything by him in that replication alleged, to have or maintain his action aforesaid thereof against the said defendant, because he saith that,—

[*Here state the subject-matter of the rejoinder, and supposing it to confess and avoid the replication, the conclusion is thus:*—]

*Conclusion*.—And this the said defendant is ready to verify: Wherefore he prays judgment if the said plaintiff ought to have or maintain his action aforesaid thereof against the said defendant.

#### REJOINDERS IN THE SEVERAL ACTIONS.

##### 256. *Rejoinder in Debt.*

[*Supposing to an action of debt on a bond there be a plea of release, to which the plaintiff replies that the release is void for infancy, and defendant proposes to rejoin a confirmation of release after age, the rejoinder might be as follows:*]

Circuit Court for A County, to wit:

— Rules, 18—.

D. D. And the said defendant, as to the said replication  
ads. of the said plaintiff to the said plea of the said de-  
C. C. fendant, saith, that after the making of the said  
release in the said plea mentioned, and before the commencement  
of this suit, to wit, on the — day of —, in the year 18—,  
the said plaintiff attained his age of twenty-one years. And the  
said defendant further saith, that after the said plaintiff had so  
attained his age of twenty-one years, to wit, on the — day of  
—, 18—, the said plaintiff, by a writing by him then and there  
made, and signed by his hand, the date whereof is the day and  
year aforesaid, assented to, ratified and confirmed the said release  
in the said plea mentioned. And this the said defendant is ready  
to verify.

F. D. M., p. d.

##### 257. *Rejoinder in Assumpsit.*

[*Supposing to an action of assumpsit, on a promissory note, there be a plea of set-off, to which the plaintiff replies the statute of limitations, and defendant proposes to rejoin by way of traverse, the rejoinder might be as follows:*]

Circuit Court for A County, to wit:

— Rules, 18—.

D. D. And the said defendant, as to the said replication  
ads. of the said plaintiff to the said plea of the said de-  
C. C. fendant, saith that the cause of action upon the said

set-off in the said plea mentioned, did accrue within ——— years next before the filing of the said plea. And of this the said defendant puts himself upon the country.

G. W. M., p. d.

### 258. *Rejoinder in Trespass.*

(3 Chit. Pl. 1233.)

[*If to an action of trespass quare cl. fr., defendant pleads, by way of express color, a demise from year to year, to which plaintiff replies a notice to quit, and defendant proposes to rejoin that notice to quit was waived, the rejoinder may be as follows:*]

Circuit Court for A County, to wit :

—— Rules, 18—.

D. D. And the said defendant, as to the said replication  
ads. of the said plaintiff to the said plea of the said defendant,  
C. C. saith that the plaintiff, after giving the  
notice to quit in the said replication mentioned, to wit, on the  
—— day of ——, in the year 18—, waived, relinquished and  
abandoned such notice, and then assented and agreed to the continuance of the said demise. And this the said defendant is ready to verify.

M. C. N., p. d.

### FORMS OF SUR-REJOINDERS.

#### SUR-REJOINDERS IN GENERAL.

### 259. *Similiter to a Rejoinder which tenders Issue.*

Circuit Court for A County, to wit :

—— Rules, 18—.

C. C. And the said plaintiff, as to the said rejoinder of  
vs. the said defendant, to the said replication of the said  
D. D. plaintiff, to the said [second] plea of the said defendant, and of which the said defendant hath put himself on the country, doth the like.

W. E. O., p. q.

### 260. *Sur-rejoinder to a Rejoinder to a Replication which Offers to Verify.*

(2 Chit. Pl. 1234.)

Circuit Court for A County, to wit :

—— Rules, 18—.

C. C. And the said plaintiff, as to the said rejoinder of  
vs. the said defendant to the said replication of the said  
D. D. plaintiff to the said [second] plea of the said defendant, saith that, [*here state the subject-matter of the sur-rejoinder, and if it deny the rejoinder, conclude to the country; if it confesses and avoids it, with an offer to verify.* Thus, (1), And this the said plaintiff prays may be inquired of by the country; (2), And this the said plaintiff is ready to verify.]

W. H. P., p. q.

**NOTE.** See *Ante*, p. 1488, Form 256. The sur-rejoinders in the several actions, as well as rebutters and sur-rebutters, may be easily framed from the foregoing. See 3 Chit. Pl. 1234 & seq.



## PLEAS TO NEW ASSIGNMENTS, AND PLEADINGS THEREUPON.

It will suffice for these to refer to 3 Chit. Pl. 1237 & seq.

## PLEAS PUIS DARREIN CONTINUANCE.

The forms of these will be found 3 Chit. Pl. 1238.

## BILLS OF EXCEPTION.

Forms of bills of exceptions are given *Ante*, p. 743, 744.

## DEMURRER TO EVIDENCE.

The form of a demurrer to evidence, and of the joinder therein, will be found, *Ante*, p. 750.

## FORMS RELATING TO DEPOSITIONS.

261. *Notice to take Depositions.*

(Sands' Forms, 200; 1 Rob. Forms, 48.)

To Mr. C. C.:

You are hereby notified, that on the — day of —, in the year 18—, at the office of — in —, between the hours of — and —, of that day, I shall proceed to take the depositions of G. W. and others, to be read as evidence in my behalf, in a certain action at law, (or *suit in equity*,) depending in the — court for the — of —, wherein I am defendant, and you are plaintiff; and if from any cause the taking of the said deposition be not commenced, or if commenced, be not concluded on that day, the taking thereof will be adjourned from day to day, [or *from time to time*,] at the same place, and between the same hours, until the same shall be completed.

Your obedient servant,

D. D.

NOTE. When parties live within a convenient distance, five days' notice is usually given, although less may suffice. In other cases ten to fifteen days will be not too much.

The notice must be *reasonable* always, and if the party be not a resident of the commonwealth, notice may be served on his counsel; (Sands' Forms, 200; V. C. 1873, c. 172, § 36; Id. c. 163, § 3); or it may be served on such non-resident by the publication thereof for four successive weeks in any newspaper printed in Virginia. (V. C. 1873, c. 163, § 2.)

The mode of service is prescribed V. C. 1873, c. 163, § 1; *Ante*, p. 532-'3.

262. *Caption of Depositions, Depositions, and Adjournment.*

(Sands' Forms, 200; 1 Rob. Forms, 49, 50.)

The depositions of G. W. and others, taken before me, —, a notary public [or a justice of the peace, or a commissioner in chancery, for the — court,] for the — of —, pursuant to notice hereto annexed, at —, [the place indicated in the notice,] in —, on the — day of —, 18—, between the hours of — and —, to be read as evidence in behalf of D. D., in a certain

action at law, [or *suit in equity*,] depending in the ——— court of ——— county of ———, wherein D. D. is defendant and C. C. is plaintiff.

Present, R. D., attorney for the defendant ;

S. P., attorney for the plaintiff.

The witness, G. W., being duly sworn, deposes as follows :

*First question for defendant.*

*Answer.*

*Second question for same.*

*Answer.*

[Continue thus the examination in chief to the end, writing the answers of the witness, as far as may be, in his own words.]

CROSS-EXAMINATION :

*First question for plaintiff.*

*Answer.*

*Second question for same.*

*Answer.*

[Continue the cross-examination to the end, writing the answers of the witness, as far as may be, in his own words.]

RE-EXAMINATION :

*First question for defendant.*

*Answer.*

*Second question for same.*

*Answer.*

And further this deponent saith not.

(Signed,)

G. W.

No other witness appearing, the further taking of these depositions is continued until to-morrow, at the same place, and between the same hours.

(Signed,) ———, N. P. [or *J. P.*, or *Com. in Ch.*]

OFFICE OF ———,

——— day of ———, 18—.

Present, R. D., attorney for defendant ;

S. P., attorney for plaintiff.

Witness J. S., being duly sworn, deposes as follows :

*First question for defendant.*

*Answer.*

&c. [as in the case of the first witness.]

And further this deponent saith not.

(Signed,)

J. S.

263. *Certificate Authenticating Depositions.*

Virginia,

County (or *Corporation*) of ———, to wit :

I, ———, a justice of the peace, [or *notary public*,] for the ——— of ———, [or *commissioner in chancery, for the ——— court*] in the said State, do hereby certify that the foregoing depositions of G. W. and J. S., were duly taken, sworn to, and subscribed before me, at the times and place, and for the purpose therein mentioned.

Given under my hand this ——— day of ———, in the year 18—.

(Signed,) ———, N. P. [or *J. P.*, or *Com. in Ch.*]

## NOTICES.

264. *Notice to quit by Landlord, to Tenant from Year to Year.*

(V. C. 1873, c. 184, § 5; Sands' Forms, 203.)

To Mr. T. T.:

You are hereby notified to quit and deliver up to me or my assigns [or to L. L., whose agent I am, and his assigns,] on the — day of — next, (that being the end of the current year of the tenancy,) the possession of the messuage or dwelling-house [or rooms and apartments, or farm, lands and premises, as the case may be,] with the appurtenances which you now hold, or claim to hold, of me [or, of the said L. L.,] situate in the — of —.

Dated this — day of —, in the year 18—.

L. L. [or, A. A., agent for L. L.]

265. *Notice by a Tenant from Year to Year, of his Intention to Quit.*

(V. C. 1873, c. 184, § 5; Sands' Forms, 204.)

To Mr. L. L.:

You are hereby notified that on the — day of — next, (that being the end of the current year of the tenancy,) I shall quit and deliver up the possession of the messuage, &c., [as in preceding form,] which I now occupy, or which you may insist I hold of you, situate in the — of —.

Dated this — day of —, in the year 18—.

T. T.

## MOTIONS.

NOTE.—In any case wherein there may be judgment or decree for money on motion, such motion shall be after *ten days' notice*, unless some other time be specified in the section giving such motion. (V. C. 1873, c. 163, § 4.)

The cases prominently excepted are the following, namely:

(1), Motions as substitutes for actions, to recover money on *any contract*.

*Sixty days' notice* is here required, and the notice must be returned to the clerk's office forty days before the *beginning of the term* at which the motion is to be made. (V. C. 1873, c. 163, § 6; *Ante*, p. 523.)

(2), Motions on forthcoming bonds, where the original debt was contracted prior to 10th April, 1865.

*Three months' notice* is then required. (V. C. 1873, c. 49, § 43; *Ante*, p. 1091.)

Let it be remembered, that where a statute requires a notice to be given, or any other act to be done a certain time before any motion or proceeding, there must be that time exclusive of the day for such motion or proceeding; but the day on which notice is given, or such act is done, may be counted as part of the time. (V. C. 1873, c. 15, § 9 (cl. 8); 1 *Insta. Com. & Stat. Law*, 42: *Ante*, p. 1091, &c.)

266. *Notice of Motion to recover Money on Contract.*(V. C. 1873, c. 163, § 6; *Ante*, p. 523.)

To Mr. D. D.:

You are hereby notified, that on the [second] day of the next term of the — court for the — of —, I shall move the said court for judgment against you, for the sum of — dollars, with interest thereon after the rate of — per centum per annum, from the — day of —, in the year 18—, until paid, the same being

due to me from you, by virtue of a promissory note for the sum of — dollars, made by you, payable to me on the — day of —, in the year 18—, [or *on demand*], and bearing date on the — day of —, in the year 18—.

Your obed't servant,

C. C.

*267. Notice of Motion for Award of Execution on Forthcoming Bond.*

(V. C. 1873, c. 185, § 3; *Ante*, p. 829-'80; *Id.* 1094; Sands' Forms, 485.)

To Messrs D. D. and S. S. :

Whereas a bond was executed by you to me on the — day of —, in the year 18—, in the penalty of — dollars, with a condition whereby, after reciting that, upon a judgment obtained by me in the — court for the — of —, against the said D. D., I had sued out a writ of *fiery facias* directed to the sheriff [or *sergeant*] of the — of —, by virtue whereof certain goods and chattels had been taken by J. B., deputy for L. M., sheriff [or *sergeant*] of the said —, to satisfy the said execution, the amount whereof at the date of the said bond, including the officer's fees and commissions [and *other lawful charges, if any*] was — dollars, it was provided, that if the said D. D. should have the said goods and chattels forthcoming on the day and at the place appointed for the sale thereof, the said obligation should be void; and the said D. D. having failed to deliver the said goods and chattels according to the condition of the said bond, or to pay the amount due on the said execution, notice is hereby given to each of you, that on the [first] day of the next term of the said — court I shall move the said court to award execution upon the said bond, in my behalf, against you and each of you, for principal, interest and costs.

Dated this — day of —, in the year 18—.

[ C. C.

*268. Notice of Motion by Surety against Principal.*

(V. C. 1873, c. 143, § 6; *Ante*, p. 1095; Sands' Forms, 489.)

To Mr. P. P. :

Judgment having been entered up in the — court for the — of —, at the suit of C. C., against me as surety for you, upon a bond, and — dollars, the amount of the said judgment, having been paid by me as such surety, on the — day of —, 18—; notice is hereby given you, that on the [first] day of the next term of the said court, wherein the said judgment was so entered up, I shall move the said court for judgment against you, for the full amount which has been paid by me as aforesaid, with lawful interest thereon, from the time the same was so paid.

Dated this — day of —, in the year 18—.

S. S.

*269. Notice of Motion by Surety against Co-Surety.*

(V. C. 1873, c. 143, § 8; *Ante*, p. 1096; Sands' Forms, 441.)

To Mr. C. S. :

P. P., having become insolvent, and you and myself being the sureties of the said P. P., bound jointly [or, *jointly and severally*] with him in a bond to C. C., for the payment of money, and judgment having been obtained in the — court

for the — of —, upon the said bond, against me as surety as aforesaid, for &c., [*describe the judgment*]; notice is hereby given you, that on the [first] day of the next term of the said court, wherein judgment has been so obtained, I shall move the said court to grant judgment and award execution against you for your share and proportion of the debt, interest and costs, recovered by the judgment aforesaid.

Dated this — day of —, in the year 18—.

S. S.

270. *Notice of Motion by Client against Attorney for Money Received.*

(V. C. 1873, c. 160, § 10; *Ante*, p. 175; *Id.* 1096; Sand's Forms, 443.)

To Mr. A. A. :

The sum of — dollars having been received by you, as my attorney, on the — day of —, 18—, from the sheriff of the county of —, under an execution sued out of the — court for the — of —, upon a judgment therein rendered on my behalf against one D. D., and payment of the money so received having been demanded of you, and you having failed and refused to pay the same when so demanded, notice is hereby given you, that on the [first] day of the next term of the — court for the — of —, I shall move the said court to render judgment against you for the money so received, and to award damages in lieu of interest, not exceeding fifteen per centum per annum, from the time of your receiving the said money until it shall be paid.

Dated this — day of —, in the year 18—.

C. C.

271. *Notice of Motion against an Officer, for Clerk's Fees Collected.*

(V. C. 1873, c. 180, § 25; *Ante*, p. 1096; Sand's Forms, 443.)

To Mr. R. R., Sheriff [or *Sergeant*] of the — of — :

Whereas I, C. C., clerk of the — court for the — of — did, on the — day of —, 18—, deliver to you my account of certain fees due to me as such clerk, from persons residing in the said —, amounting together to the sum of — dollars; and whereas, you have failed, within six months next after such delivery, to account with me therefor, and to pay me the said fees, abating such as were charged to persons who had no estate within your —, out of which the same could be made, and abating also your lawful commission, notice is hereby given you, that on the [first] day of the next term of the — court for the — of —, I shall move the said court for judgment against you, for the sum wherewith you are chargeable on account of the said fees, together with damages thereon not exceeding fifteen per centum per annum, from the expiration of the said six months till the judgment shall be discharged.

Dated this — day of —, in the year 18—.

C. C.

272. *Notice of Motion against an Officer for not Returning Execution.*

(V. C. 1873, c. 49, § 27, 28; *Ante*, p. 838; *Id.* p. 1096; Sands' Forms, 444.)

To Mr. R. R., Sheriff [or *Sergeant*] of the — of —.

Whereas a writ of *fiery facias* issued from the clerk's office of the — court for the — of —, on the — day of —, in the year 18—, upon a judgment in

my name against D. D. for — dollars, with interest thereon after the rate of — per centum per annum, from the — day of —, 18—, till payment, and — dollars costs, which writ was returnable to the first day of the then next term of the said court, [or *whatever is the return-day*]; and whereas the same came into the possession of J. B., your deputy (†), and he has failed to return the same to the clerk's office whence it issued, on or before the return-day thereof; (\*) notice is hereby given you, that on the [first] day of the next term of the — court for the — of —, I shall move the said court to fine you, according to law, for the failure to return the said execution.

Dated this — day of —, in the year 18—.

C. C.

*273. Notice where one Fine has already been Imposed upon Officer.*

(V. C. 1873, c. 49, § 28, 27; *Ante*, p. 838; *Id.* 1096; Sands' Form, 444.)

[*As in the preceding form to* (\*), and then say]: and whereas the said court, on the — day of —, in the year 18—, did impose upon you a fine of — dollars, for the failure to return the said execution, and the same not being yet returned, notice is hereby given you, that on, &c., I shall move the said court to impose upon you a further fine, according to the statute in such case made, for the continued failure to return the said execution.

Dated this — day of —, in the year 18—.

C. C.

*274. Notice where the Officer Returns the Writ, without noting how he has Executed it.*

(V. C. 1873, c. 49, § 27, 28; *Ante*, p. 838; *Id.* 1096; Sands' Forms, 444.)

[*As in the last Form but one*, (No. 272) to (†), and then say]: and he has returned it to the clerk's office whence it issued, without noting thereon how he hath executed the same; notice is hereby given you, that on, &c., I shall move the said court to fine you, according to law, for the failure to make a proper return upon the said execution.

Dated this — day of —, in the year 18—.

C. C.

*275. Notice of Motion against Officer, for not Returning Forfeited Forthcoming Bond.*

(V. C. 1873, c. 49, § 27, 28; *Id.* c. 185, § 2; *Ante*, p. 830; *Id.* 1096; Sands' Forms, 445.)

To Mr. R. R., Sheriff [or *Sergeant*] of the — of —:

Whereas, upon a judgment obtained in the — court for the — of —, by me against one D. D. for, &c., [*describe the judgment*], a writ of *fiery facias* was issued from the clerk's office of the said court, on the — day of —, in the year 18—, returnable to the first day of the then next term thereof, which writ came into the possession of J. B., your deputy, (†) and was by him levied on goods and chattels of the said D. D. (\*) who gave bond with S. S., his surety, to have the said goods and chattels forthcoming at the time and place of sale, but afterwards failed to deliver and have the same forthcoming, according to the condition of his said bond; and whereas, the said J. B., your deputy as aforesaid, has failed to deliver the said bond to me, or to any one for me, although it has been demanded of him, and has also failed to return the same to the clerk's office aforesaid, within

thirty days after the forfeiture thereof as required by law; notice is therefore hereby given you that on, &c., I shall move the said court to fine you according to law for the said failure.

Dated this — day of —, in the year 18—.

C. C.

276. *Notice of Motion against Officer, for not Returning Account of Sales of Goods sold under Execution.*

(V. C. 1873, c. 49, § 27, 28; *Ante*, p. 838; *Id.* 1096; Sands' Forms, 446.)

[*As in last Form to (\*)*, and then say]; and whereas your said deputy, on the — day of —, 18—, made sale of the said goods and chattels, but has failed to return, in the manner and time required by the statute in that case made, an account of the sales made by him, in virtue of the said execution, notice is therefore hereby given you that on, &c., I shall move the said court to fine you according to law for the said failure.

Dated this — day of —, in the year 18—.

C. C.

277. *Notice in such Case, by Defendant in Execution.*

To Mr. R. R., Sheriff [or *Sergeant*] of the — of —.

Whereas, upon a judgment obtained in the — court for the — of —, by one C. C. against me, for, &c. [*pursue the last Form but one*, (No. 275,) to (†), and then say]: and was by him levied on my goods and chattels; and whereas your said deputy, on, &c. [*as in last Form to end.*]

278. *Notice in such Case, by Purchaser of Goods.*

To Mr. R. R., Sheriff [or *Sergeant*] of the — of —.

Whereas, upon a judgment obtained in the — court for the — of —, by one C. C. against one D. D., for, &c. [*as in Form 275, to (\*)*, and then say]: and whereas your said deputy, on the — day of —, 18—, made sale of the said goods and chattels, and I became the purchaser of the same, but your said deputy has failed to return, &c. [*as in Form 276, to end.*]

279. *Notice of Motion by Creditor against Officer, for Money Received under Execution.*

(V. C. 1873, c. 49, § 45; *Ante*, p. 840-'41; *Id.* 1096; Sands' Forms, 447; 1 Rob. Forms, 292.)

To Messrs. R. R., Sheriff, &c. [*as in foregoing Forms*,] and S. S., T. T., &c. [*naming them*,] his sureties.

Whereas, upon a judgment obtained in the — court for the — of —, by me against one D. D., for, &c. [*describe the judgment*,] a writ of *feri facias* was issued from the clerk's office of the said court, on the — day of —, in the year 18—, returnable to the first day of the then next term, and directed to the sheriff [or *sergeant*] of the — of —, upon which writ, J. B., deputy for the said [sheriff] as aforesaid, made return that, &c. [*state the return*]; (\*). And the money so by the said deputy, on the said writ, returned levied, has not been paid to me; Notice is therefore given to each of you, that on, &c., I shall move the — court for the — of —, for judgment against you jointly, for the money

so on the said writ returned levied, with interest thereon after the rate of fifteen per centum per annum, from the return day of the said writ, until the judgment shall be discharged.

Dated this — day of —, in the year 18—.

C. C.

NOTE.—A like motion may be made against the *deputy and his sureties*. (V. C. 1873, c. 49, § 45.)

280. *Notice where the Execution was delivered to the Officer of a County, &c., wherein Creditor does not Reside.*

(V. C. 1873, c. 183, § 81, 87; *Ante*, p. 840, 1096; Sands' Forms, 447; 1 Rob. Forms, 292.)

[*Pursue the preceding Form, 279, to (\*)*, and then say]: and although in consequence of my not residing in the — of —, I named — in that county [or *corporation*] to be my agent, for the purpose of receiving the money on the said execution, and gave him a written order therefor, [*the attorney at law of the creditor does not require a written order*,] yet the said money has not been paid, either to the said — or to me; and although the said — hath demanded payment from the said R. R., sheriff, [or *sergeant*,] as aforesaid, in his said county, [or *corporation*,] of the money so by the said deputy on the said writ returned levied as aforesaid, yet the said money has not been paid, either to the said — or to me; Notice is therefore given to each of you, that on, &c. [*as in the preceding Form, to the end.*]

281. *Notice of Motion against Officer and Sureties, for Surplus arising from Sale under Execution.*

(V. C. 1873, c. 183, § 86; Id. c. 49, § 45; *Ante*, p. 840, 1046; Sands' Forms, 449; 1 Rob. Forms, 294.)

To Messrs. R. R., Sheriff [or *Sergeant*,] of, &c., and S. S., T. T., &c., [*naming them*,] his sureties.

Whereas, upon a judgment obtained in the — court for the — of —, by C. C. against me, for, &c. [*describe the judgment*,] a writ of *fiery facias* was issued from the clerk's office of the said court, on the — day of —, in the year 18—, returnable to the first day of the then next term, and directed to the said sheriff [or *sergeant*,] of the said — of —, upon which writ, J. B., deputy for the said R. R., sheriff [or *sergeant*,] as aforesaid, made return that, &c. [*state the return*,] and there has been a failure to pay over to me the surplus money arising from the sale under the said execution, which surplus, after satisfying the said C. C., at whose suit the said sale was made, and all costs and charges of such sale, amounts to — dollars; Notice is therefore hereby given to each of you, that on, &c., I shall move the said — court for the — of —, for judgment against you jointly, for the said surplus money, with interest thereon after the rate of fifteen per centum per annum, from the return day of the said writ until the judgment shall be discharged.

Dated this — day of —, in the year 18—.

D. D.



282. *Notice of Motion by Sheriff, &c. against Deputy, for Amount of Judgment against Sheriff, &c., for Deputy's Misconduct.*

(V. C. 1873, c. 49, § 45, 46; *Ante*, p. 1096; Sands' Forms, 449; 1 Rob. Forms, 297.)

To Mr. J. B. :

Whereas, on the — day of —, in the year, 18— judgment was rendered by the — court for the — of —, in favor of C. C. against me as sheriff [or *sergeant*,] of the — of —, for the sum of, &c., [describe the judgment,] for and on account of your default and misconduct as my deputy in the said office of sheriff, [or *sergeant*]; Notice is therefore hereby given you, that on, &c., I shall move the — court for the — of —, for the full amount of the judgment so rendered against me, and to award execution for the same.

Dated this — day of —, in the year 18—.

R. R..

283. *Notice of Motion by Sheriff, &c., against Deputy and his Sureties, for other Moneys.*

(V. C. 1873, c. 49, § 46; *Ante*, p. 1096; Sands' Forms, 452.)

To Messrs. J. B., S. S., T. T., &c. [naming deputy and sureties.]

Whereas, the said J. B., who came into the office of deputy sheriff [or *sergeant*,] under me, R. R., the sheriff [or *sergeant*,] of the — of —, is found in arrears for the following money received, or which ought to have been received, by him by virtue of his office, and for which I, as his principal, am chargeable; that is to say, for, &c. [here specify the same.] And whereas the said J. B. has not paid and delivered the said money to the person [or *persons*] entitled thereto, notice is therefore hereby given to each of you, that on, &c., I shall move the — court of the — of —, to give such judgment against you, jointly, as I am liable to by motion or suit against me, on account and by reason of the said arrears, misconduct, and default of the said J. B.

Dated this — day of —, in the year 18—.

R. R.

284. *Notice of Motion by Incorporated Company, against Delinquent Stockholder.*

(V. C. 1873, c. 57, § 23, 25; 1 Rob. Forms, 282-'3.)

To Mr. D. D. :

Whereas the president and directors of the — company, [using the corporate name,] did by resolution, adopted on the — day of —, in the year 18—, require from the stockholders an advance of — dollars on each share, and advertised the said requisition in the —, a newspaper printed at —, and you have failed, for one month after such advertisement, to pay the sum required of you by the said resolution, amounting on your — shares to — dollars; and whereas the said president and directors, after having given one month's notice of the time and place of sale by advertisement in the same newspaper, (\*) sold your said — shares at public auction, on the — day of —, in the year 18—, when — became the purchaser thereof at the price of — dollars, to whom the same have been accordingly conveyed; and whereas the said sale did not produce the sum required to be advanced, with — dollars, the incidental charges attending the sale; Notice is hereby given you, that on the [first] day of the next

term of the — court for the — of —, the president and directors of the said company [*employ the true corporate name,*] will move the said court for judgment against you for the balance of — dollars due from you as aforesaid.

Dated this — day of —, in the year, 18—.

On behalf of the President and Directors,

C. C.

285. *Notice where the Shares were Offered for Sale, and there were no Bidders.*

(1 Min. Insts. 530-'81.)

To Mr. D. D. :

[*As in the last Form, to the (\*)*, and then say]: offered the said shares for sale, at public auction, on the — day of —, in the year 18—, and there were no bidders therefor; Notice therefore is hereby given you, that on the [first] day of the next term of the — court for the — of —, the president and directors of the said company, [*using the corporate name as it is,*] will move the said court for judgment against you for — dollars, the sum required to be advanced as aforesaid, with — dollars, the incidental charges attending the said attempt to sell, amounting together to — dollars.

Dated this — day of —, in the year 18—.

On behalf of the President and Directors.

C. C.

286. *Notice of Motion by the Mutual Assurance Society against Fire, for Quotas.*

(1 Rob. Forms, 283; Currie v. M. A. Soc. 4 H. & M. 315; Greenhow v. Barton, 1 Munf. 590; Greenhow v. Buck, 5 Munf. 263; Stratton v. M. A. Soc. 6 Rand. 22; M. A. Soc. v. Stone, 3 Leigh, 218; Farmers Bank v. M. A. Soc. 4 Leigh, 69; Shirley v. M. A. Soc. 2 Rob. 705.)

To Mr. D. D. :

Take notice, that on the — day of the next — term of the — court for the — of —, the Mutual Assurance Society against fire on buildings of the State of Virginia will, by their attorney, move the said court for judgment and award of execution against you, for the sum of — dollars, that being the amount of the quotas for the years — and —, due to the said Society per declaration numbered —, and filed in the general office of assurance, and for lawful interest on — dollars, part thereof, from the — day of —, 18—, and on — dollars, the residue thereof, from the — day of —, 18—, until payment, with costs, damages, and expenses, according to law, and the rules and regulations of the said Society.

J. R.,

*Prin. Ag't Mut. Ass'e Society, &c.*

WRITS OF SCIRE FACIAS.

287. *Writ of Scire Facias to revive an Action against a Personal Representative.*

(*Ante*, p. 796; Sands' Forms, 411; Rob. Forms, 7, 20.)

The Commonwealth of Virginia,

To the Sheriff [or *Sergeant*] of the — of —, Greeting :

Whereas an action has been depending in our — court, for the — of —, between C. C., plaintiff, and D. D., defendant, and before judgment was given,

or verdict rendered therein, the said D. D. died, and the plaintiff has applied for a *scire facias* against E. F., executor [or *administrator*] of the said D. D., [or against S. S., sheriff of the county of —, who was ordered by the court of the said county to take into his possession the estate of the said D. D.]; Therefore we command you that you make known to the said E. F., executor [or *administrator, &c.*,] as aforesaid, that he be before the judge of our said court, at the court-house of the said —, on the first day of the next term [or *that he appear at the clerk's office of our said court, at rules to be holden for the said court, on the first Monday in — next,*] to show cause, if any he can, why the said action should not be proceeded in to a final judgment. And have then there this writ. Witness, B. T., clerk of our said — court, at the court-house, this — day of —, in the year of our Lord eighteen hundred and —; and of our foundation the —.

Teste, B. T., Clerk.

288. *Scire Facias to revive an Action of Detinue against a Personal Representative.*

(*Ante*, p. 794; Sands' Forms, 412; Rob. Forms, 23.)

The Commonwealth of Virginia,

To the Sheriff [or *Sergeant*] of the — of —, Greeting :

Whereas an action of detinue has been depending in our — court for the — of —, between C. C., plaintiff, and D. D., defendant, and before judgment was given, or verdict rendered therein, the said D. D. died; And whereas now, on behalf of the said C. C., we are informed that since the death of the said D. D., the property for which the said action was brought has come to the hands of E. F., executor [or *administrator, &c.*,] of the said D. D. : And the said C. C. hath applied for a *scire facias*, according to the form of the statute; Therefore we command you, that you make known to the said E. F., executor [or *administrator, &c.*,] as aforesaid, that he be before the judge of our said court, at the court-house of the said —, on the first day of the next term, [or *that he appear at the clerk's office of our said court, at the rules to be holden for the said court, on the first Monday in — next,*] to show cause, if he can, why the said action should not be proceeded in to a final judgment. And have then there this writ. Witness, &c., [*as in Form, 287.*]

289. *Scire Facias where Execution has not issued within the Year.*

(*Ante*, p. 799; Sands' Forms, 412.)

The Commonwealth of Virginia,

To the Sheriff [or *Sergeant*] of the — of —, Greeting :

Whereas, C. C., at a — court for the — of —, at the court-house of the said —, on the — day of —, in the year 18—, by the judgment of our said court, recovered against D. D. — dollars, with interest thereon, after the rate of — per centum per annum, from the — day of —, 18—, till payment, for a certain debt, and the interest thereon, and also — dollars, for his costs by him about his suit, in that behalf expended; whereof the said D. D. is convict, as by the record thereof in our same court manifestly appears; (\*) And whereas now, on behalf of the said C. C. it is said, that although judgment be given as aforesaid, yet execution of the debt, interest and costs aforesaid, still remains to be made; but more than a year has passed since the judgment; Therefore, at the instance of the said C. C., we command you, that you make known to the said D. D., that he be before the judge of our said court, at the court-house of the said

—, on the *first* day of the next term, [or that he appear at the clerk's office of our said court, at the rules to be holden for the said court, on the first Monday in — next,] to show cause, if any he can, why the said C. C. ought not to have execution against him of the debt, interest and costs aforesaid, according to the judgment aforesaid. And have then there this writ. Witness, &c., [as in Form 287.]

290. *Scire Facias upon a Judgment in Detinue, to revive the Action against Defendant's Personal Representative.*

(*Ante*, p. 794; Sands' Forms, 414; Rob. Forms, 23.)

The Commonwealth of Virginia,

To the Sheriff [or *Sergeant*] of the — of —, Greeting :

Whereas C. C., at a — court for the — of —, at the court-house of the said —, on the — day of —, in the year 18—, by the judgment of our said court, recovered against D. D. the following property, to wit, a —, of the price of — dollars, if it might be had, but if not, then the price aforesaid of the said property, or of such of it respectively as might not be had, and also — dollars, which to the said C. C., in the same court were adjudged for his damages which he sustained by occasion of the detention of the said —, and — dollars for his costs by him about his suit in that behalf expended, whereof the said D. D. was convict, as by the record thereof in our same court remaining, manifestly appears; And whereas now, in behalf of the said C. C., it is said, that although judgment be given as aforesaid, yet execution thereof still remains to be had; and we are informed that since the said judgment was given the said D. D. has died, having first made his last will and testament, and thereof appointed E. F. executor, who hath proved the same, and taken upon himself the burden of its execution, [or, *died intestate, and administration of his personal estate has been granted to E. F.*]; and we are further informed, that since the death of the said C. D., the property aforesaid has come to the hands and possession of the said E. F., executor [or *administrator*] as aforesaid, that he be, &c., at, &c., on, &c., to show, if he have anything to say, why the said D. D. ought not to have execution against him for the — aforesaid, if they may be had, but if not, then for the price aforesaid of it, and execution against him, as such executor [or *administrator*] as aforesaid, of the damages and costs aforesaid, to be levied, as to the said damages and costs, of the goods and chattels which were of the said E. F., at the time of his death, in the hands of the said E. F. to be administered. And have then there this writ. Witness, &c., [as in Form 287.]

291. *Scire Facias upon a Judgment on a Bond with Collateral Condition, and Assigning new Breaches.*

(V. C. 1873, c. 178, § 17; *Ante*, p. 25, 584; Sands' Forms, 418; Rob. Forms, 17; 1 Rob. Forms, 250.)

The Commonwealth of Virginia,

To the Sheriff [or *Sergeant*] of the — of —, Greeting :

Whereas C. C., at a — court, held for the — of —, at the court-house, on the — day of —, in the year 18—, by the judgment of our said court, recovered against D. D. the sum of — dollars, [the penalty of the bond] for a certain debt, and also — dollars, for his costs by him about his suit in that behalf expended, whereof the said D. D. is convict, as appears to us of record; but the said judgment was to be discharged by the payment of — dol-

lars, then assessed for the damages sustained by the said C. C., by occasion of the breach which had been assigned of the condition of the writing obligatory in the declaration in the said suit mentioned, with interest thereon, after the rate, &c., from, &c., till payment, and the costs aforesaid, and such other damages as might be thereafter assessed, upon a writ or writs of *scire facias* being sued out on the said judgment, and new breaches of the said writing obligatory assigned. And whereas now, the said C. C., for further and other breaches of the condition of the said writing obligatory, according to the form of the statute in such case made, gives our said court here to understand and be informed, &c., [*assigning the further breaches*]; which said several breaches of the condition of the said writing obligatory so assigned, the said C. C. doth aver, and give our said court here to understand and be informed, are further and other breaches than the breach for and by reason of which he obtained the said judgment so by him recovered as aforesaid; and for which other and further breaches, he hath humbly besought us to provide him a proper remedy; Therefore we command you, that you make known to the said D. D., that he be before the judge of our said court, at the court-house of the said —, on the first day of the next term, [*or that he appear at the clerk's office of our said court, at the rules to be holden for the said court, on the first Monday in — next*], to show cause, if any he can, why execution should not be had and awarded against him upon the judgment aforesaid, for the damages which the said C. C. hath sustained by reason of the said further and other breaches of the condition of the writing obligatory aforesaid. And have then there this writ. Witness, &c., [*as in Form 287.*]

### 292. *Scire Facias against an Administrator de bonis non.*

(Sands' Forms, 416; 1 Rob. Forms, 249.)

The Commonwealth of Virginia,

To the Sheriff [or *Sergeant*] of the — of —, Greeting:

Whereas C. C., at a — court held for the — of —, at the court-house, on the — day of —, in the year 18—, by the judgment of our said court, recovered against D. D., as executor of the last will and testament [*or as administrator of the personal estate*] of E. E., deceased, the sum of — dollars, &c., [*recite the judgment,*] whereof the said D. D., as executor [*or administrator*] as aforesaid is convict, as by the record thereof in the same court manifestly appears; (\*) And whereas, afterwards the said D. D. died, since whose death, administration of the personal estate of the said E. E., deceased, left unadministered by the said D. D., [*with the will of the said E. E. annexed,*] has been granted to F. F., as we are informed; And whereas now, on behalf of the said C. C., it is said that although judgment be given as aforesaid, yet execution of the debt [*or damages*], interest and costs aforesaid, still remains to be made; Therefore, at the instance of the said C. C., we command you, that you make known to the said F. F., administrator as aforesaid, that he be before the judge of our said court, at the court-house of the said —, on the first day of the next term, [*or that he appear at the clerk's office of our said court, at the rules to be holden for the said court, on the first Monday in — next,*] to show, if he has anything to say, why the said C. C. ought not to have execution against him, the said F. F., as such administrator as aforesaid, of the debt [*or damages*], interest and costs aforesaid, to be levied of the goods and chattels, which were of the said E. E., deceased, at the time of his death, in the hands of the said F. F., to be administered. And have then there this writ, &c., [*as in Form 287.*]

293. *Scire Facias on a Judgment against a Personal Representative, to be Levied Quando Acciderint.*

(Sands' Forms, 419; 1 Rob. Forms, 251.)

The Commonwealth of Virginia,

To the Sheriff [or *Sergeant*] of the — of —, Greeting:

Whereas C. C., at a — court, held for the — of — at the court-house, on the — day of —, in the year 18—, by the judgment of our said court, recovered against D. D., executor of the last will and testament [or *administrator of the personal estate*] of E. E., deceased, the sum of — dollars, with interest thereon, after the rate, &c., from, &c., till payment, and also — dollars, for his costs, by him about his suit in that behalf expended, to be levied of the goods and chattels which were of the said E. E., deceased, at the time of his death, [who died intestate], and which, since the plea pleaded by the said D. D. in the said suit, had come, or which should thereafter come to the hands of of the said D. D., as such executor [or *administrator*] to be administered; as by the record of the said judgment in our said court manifestly appears; And whereas now, on behalf of the said C. C., it is said that although judgment be given as aforesaid, yet execution of the debt [or *damages*], interest and costs aforesaid, still remains to be made; and that since the said plea pleaded, divers goods and chattels, which were of the said E. E., at the time of his death, came to and are now in the hands of the said D. D., as executor [or *administrator*] as aforesaid, to be administered; Therefore, at the instance of the said C. C., we command you, that you make known to the said D. D., executor [or *administrator*] as aforesaid, that he be before the judge of our said court, at the court-house of the said —, on the first day of the next term [or *that he appear at the clerk's office of our said court, at the rules to be holden for the said court, on the first Monday in — next,*] to show, if he has anything to say, why the said C. C. ought not to have execution against him, the said D. D., executor [or *administrator*] as aforesaid, of the debt [or *damages*], interest and costs aforesaid, according to the judgment aforesaid, to be levied of the goods and chattels, which were of the said E. E., deceased, at the time of his death, and which have come to and are now in the hands of the said D. D., as executor [or *administrator*] as aforesaid, to be administered. And have then there this writ. Witness, &c., [as in Form 287.]

294. *Scire Facias to have a new Execution, where the Sale of Property is indemnified, and the Value is recovered from the Execution-Creditor.*

(V. C. 1873, c. 183, § 39; 1 Rob. Forms, 252; Sands' Forms, 420.)

The Commonwealth of Virginia,

To the Sheriff [or "*Sergeant*"] of the — of —, Greeting:

Whereas, C. C., at a — court, held for the — of —, at the court-house, on the — day of —, in the year 18—, by the judgment of our said court, recovered against D. D. the sum of — dollars, with interest thereon, after the rate, &c., from, &c., till payment, for a certain debt, [or *for certain damages*], and the interest thereon, and also — dollars, for his costs by him about his suit in that behalf expended, whereof the said D. D. is convict, as by the record thereof in our said court manifestly appears. And whereas, after the said judgment was so given, a writ of *feri facias* was sued out thereupon, directed to the sheriff [or *sergeant*] of the — of —, who levied the same on the

following property, to wit, [*here specify it*]; and a doubt arising whether the right of the said property was in the said D. D. or not, the said sheriff [or *sergeant*], applied to the said C. C. for an indemnifying bond, with security, conditioned according to law; which bond was accordingly given, and the sheriff [or *sergeant*] aforesaid, after such notice as the law requires, sold the said property afterwards, to wit, on the — day of —, 18—, for a large sum of money, to wit, for the sum of — dollars; And whereas, afterwards, one E. E., who claimed the said property, prosecuted his action upon the bond, and in the said action recovered against the said C. C. damages to a large amount, to wit, to the amount of the said sum of — dollars, last above named; which being shown to the court from which the said execution issued, our said court did thereupon quash so much of the return on the said execution as related to the sale aforesaid; And whereas now, the said C. C. desires that a new writ or writs of execution may be awarded for the amount for which the said property was sold, together with legal interest from the day of sale; Therefore we command you that you make known to the said D. D., that he be before the judge, &c., on, &c., [or *that he appear at the clerk's office, &c.*] [*as in the preceding Form*], to show, if he has anything to say, why a new writ or writs of execution should not be accordingly awarded. And have then there this writ. Witness, &c., [*as in Form 287.*]

295. *Scire Facias upon Recognizance to Keep the Peace.*

(Sands' Forms, 421; 1 Rob. Forms, 260.)

The Commonwealth of Virginia,

To the Sheriff [or *Sergeant*] of the — of —, Greeting:

Whereas, at a — court held for the — of —, on the — day of —, 18—, before the judge of our said court, D. D., E. E., and F. F. personally appeared and severally acknowledged themselves to be indebted to the Commonwealth of Virginia, that is to say, the said D. D. in the sum of — dollars, and the said E. E. and F. F. in the sum of — dollars each, to be levied of their respective goods and chattels, lands and tenements, and to the said Commonwealth rendered, with a condition that if the said D. D. should keep the peace, and be of good behavior towards all the citizens of this Commonwealth, and particularly towards a certain X. Y., for the term of one year then next ensuing, then the recognizance aforesaid was to be void, as by the record of the said recognizance, remaining in our said court, appears; And whereas the said D. D. has not kept the peace and been of good behavior towards all the citizens of this Commonwealth for the term of one year next ensuing the date of the said recognizance, [*or if one year has not elapsed since the scire facias issued, say—has not, from the time of the said recognizance, kept the peace and been of good behavior towards all the citizens of this Commonwealth,*] but has broken the peace, and been of bad behavior, in this, that before the expiration of one year next ensuing the date of the said recognizance, to wit, on the — day of —, 18—, at the county aforesaid, the said D. D. violently assaulted and beat one X. Y., whereby the condition of the said recognizance is broken. Therefore we command you, that you make known to the said D. D., E. E., and F. F. that they be before the judge, &c., on, &c. [*or that he appear at the clerk's office, &c., as in Form 293,*] to show, if anything for themselves they have to say, why the said Commonwealth may not have, for its own use, execution against the said D. D., of the said — dollars, and against the said E. E. and F. F., of the said — dollars, to be levied of their respective goods and chattels, lands and tenements, according to the form and effect of the recognizance aforesaid. And have then there this writ. Witness, &c. [*as in Form 287.*]

296. *Scire Facias on Recognizance to appear and answer a Felony.*

(Sands' Forms, 422; 1 Rob. Forms, 261.)

The Commonwealth of Virginia,

To the Sheriff [or *Sergeant*] of the — of —, Greeting:

Whereas, at a — court held for the — of —, at the court-house, on the — day of —, 18—, before the judge of our said court, D. D., E. E., and F. F. personally appeared and severally acknowledged themselves to be indebted to the Commonwealth of Virginia, that is to say, the said D. D. in the sum of — dollars, and the E. E. and F. F. in the sum of — dollars each, to be levied of their respective goods and chattels, lands and tenements, and to the said Commonwealth rendered; Yet upon condition that if the said D. D. should personally appear before the judge of, &c., at, &c., on the first day of the then next term, to answer us of a certain felony whereof he stood accused, and should not depart thence without the leave of the said court, then the said recognizance was to be void, as by a copy of the said recognizance to our said — court transmitted, and now remaining filed among the records thereof, manifestly appears; And whereas the said D. D. hath failed to make his personal appearance before the judge of our said — court, at the time and place aforesaid, according to the condition of the said recognizance, as appears of record; Therefore, &c. [*as in the preceding Form, No. 295.*]

## FORMS IN EQUITY.

NOTE.—These being given in the text, must here be simply referred to, as follows:

297. *Memorandum for Suit in Equity.**Ante*, p. 1115.298. *Writ of Summons in Chancery.**Ante*, p. 1115.299. *Order Appointing a Guardian ad Litem.**Ante*, p. 1118.300. *Bill in Chancery.**Ante*, p. 1141.301. *Order of Injunction in Vacation.*<sup>1</sup>*Ante*, p. 1145.302. *Demurrer to Bill in Chancery.**Ante*, p. 1153.303. *General Formula for Plea in Chancery.**Ante*, p. 1172.304. *Plea in Abatement in Chancery.**Ante*, p. 1172.



305. *Plea of Statute of Limitations in Equity.**Ante*, p. 1173.306. *Plea of Statute of Parol Agreements in Equity.**Ante*, p. 1173.307. *Disclaimer in Chancery.**Ante*, p. 1175.308. *Formulae for the Several Parts of the Answer.**Ante*, p. 1186, 1187.309. *Formula for the Essential Parts of the Answer.**Ante*, p. 1187.310. *Formula for Full Answer.**Ante*, p. 1188.311. *Answer of Infant Defendant.**Ante*, p. 1190.312. *Interlocutory Decree.**Ante*, p. 1205.313. *Final Decree.**Ante*, p. 1208.314. *Report of Master-Commissioner, &c.**Ante*, p. 1244.315. *Notice of Master-Commissioner.**Ante*, p. 1245.316. *Settlement of Executor's Account.**Ante*, p. 1246-7.

## FORMS IN ADMIRALTY.

317. *Libel in Rem.—General Form.**Ante*, p. 1258; 2 Abbott's U. S. Pract. 370.

District Court of the United States,

For the [Eastern] District of [Virginia]: In Admiralty.

To the Honorable R. W. H., Judge of the District Court of the United States, in  
and for the [Eastern] District of [Virginia.]The libel of A. B., [describing the libellant, as—of the city of —, merchant,  
&c., as the case may be,] (a) against the [ship] W., whereof U. V. is or lately was  
master, her tackle, apparel, furniture, [and cargo,] (b), and against all persons in-

tervening for their interest in the said vessel, (e) in a cause of contract, [or as the case may be,] civil and maritime, alleges and articulately propounds as follows :

(d) First, That [here set forth the first statement of the libel, and follow with others in distinct articles, numerically arranged. The last article should be as follows]:

[Tenth,] That all and singular the premises are true, and within the admiralty and maritime jurisdiction of the United States, and of this honorable court.

(e) Wherefore the libellant prays that process in due form of law, according to the course of this honorable court, in cases of admiralty and maritime jurisdiction, may issue (f) against the said [ship,] her tackle, apparel, furniture, [and cargo,] and that (g) all persons claiming any right, title, or interest in the said [ship, or ship and cargo] (h) may be cited to appear and to answer upon oath, all and singular the matters aforesaid, and that this honorable court would be pleased to decree (i) the payment of the damages aforesaid, [or as the case may be,] with costs, and that the said vessel [or vessel and cargo] may be condemned and sold to pay the same, and that the libellant may have such other and further relief in the premises as in law and justice he may be entitled to receive.

(Signed,)

A. B.

Sworn to before me, this — day of —, 18—.

W. B. Q., Proctor.

G. H.,

O. A. T., Advocate.

U. S. Commissioner.

### 318. *Libel in Rem and in Personam.*

[Pursue Form 317 to (b), and then say]: and against Y. Z., (describing the defendant,) [and proceed as in Form 317 to (g), and then say]: the said Y. Z., and [then follow Form 317 to the end.]

### 319. *Libel in Personam.—General Form.*

[Proceed as in Form 317 to (a), and continue] against Y. Z., of the city of —, merchant, [describing defendant according to the fact,] owner of the ship W., [continue in the same Form to (c),] in a cause of [as in the Form to (f), and then say]; against the said Y. Z., and that he may be cited to appear, and to answer upon oath [as in the said Form.]

[If the arrest of the defendant is sought, proceed as in said Form 317, from (e), as follows]: Wherefore the libellant prays that a warrant of arrest in due form of law, according to the course of this honorable court, in cases of admiralty and maritime jurisdiction, may issue against the said Y. Z., and that he may be cited to appear and to answer on oath this libel, and the matters therein contained, and that this honorable court will be pleased to decree to the libellant the payment of the damages aforesaid, [or as the case may be,] with costs, and to give such other and further relief as in law and justice he may be entitled to receive.

### 320. *Stipulation for Libellant's Costs.*

(Ante, p. 1259; 2 Abb. U. S. Pr. 371.)

District Court of the United States,

For the [Eastern] District of [Virginia]:

Filed the — day of —, 18—.

STIPULATION FOR LIBELLANT'S COSTS, ENTERED INTO PURSUANT TO THE RULES AND PRACTICE OF THIS COURT.

Whereas a libel was filed in this court, on the — day of —, in the year

18—, by A. B. against [the ship W., her tackle, apparel, furniture, and cargo,] for the reasons and causes in the said libel mentioned, and praying that [the same may be condemned and sold to answer the prayer of the libellant], and the said libellant and S. S., his surety, hereby consenting and agreeing that, in case of default or contumacy on the part of the libellant, or his surety, execution may issue against their goods and chattels and lands, for the sum of two hundred and fifty dollars;

Now, therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that the stipulators undersigned shall be, and each of them is bound in the sum of two hundred and fifty dollars, conditioned that the libellant above-named shall appear and answer to the cause, and to interrogatories, and shall pay all such costs as shall be awarded against him by this court, or in case of appeal, by the appellate court.

(Signed,)

A. B.  
S. S.

Taken and acknowledged before me, this — day of —, 18—.

G. H., U. S. Commissioner.

### *Justification of Surety.*

[Eastern] District of [Virginia], to wit:

S. S., of the city of —, [merchant,] party to the above stipulation, being duly sworn, says that he resides at No. —, — street, in the city of —, and that he is worth the sum of [five] hundred dollars, over and above all his just debts and liabilities.

(Signed,)

S. S.

Sworn to this — day of —, 18—, before me.

G. H., U. S. Commissioner.

Recorded the — day of —, 18—.

J. R. P., Clerk.

### *321. Attachment and Monition in Rem.*

(*Ante*, p. 1259-'60; 2 Abb. U. S. Pr. 372.)

[Eastern] District of [Virginia], to wit:

The President of the United States of America,

To the Marshal of the [Eastern] District of [Virginia], Greeting:

Whereas a libel hath been filed in the District Court of the [Seal of court.] United States for the [Eastern] District of [Virginia], on the — day of —, in the year 18—, by A. B. against the [ship] W., her tackle, apparel, furniture, and cargo, [*according to the libel.*] in a cause of contract, civil and maritime, for the reasons and causes in the said libel mentioned, and praying the usual process and monition of the said court, in that behalf to be made, and that all persons interested in the said vessel, her tackle, &c. [*as above,*] may be cited in general and special to answer the premises, and all proceedings being had, that the said vessel, her tackle, &c., may, for the causes in the said libel mentioned, be condemned and sold to pay the demands of the libellant [*thus reciting briefly the objects and prayer of the libel*]:

You are therefore hereby commanded to attach the said vessel, her tackle, &c., and to detain the same in your custody until the further order of the court respecting the same, and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of the said libel, that they be and appear before the said court, to be

held in and for the [Eastern] District of [Virginia], at the —, in the city of —, on the — day of —, 18—, at twelve o'clock noon of the same day, if the same shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations in that behalf. And what you shall have done in the premises do then and there make return thereof, together with this writ.

Witness, the honorable R. W. H., judge of the said court, at the city of —, in the [Eastern] District of [Virginia], this — day of —, in the year of our Lord one thousand eight hundred and —, and of our independence the —.

O. A. R., *Proctor for Libellant.*

J. R. P., *Clerk.*

[*Indorsement.*]

I hereby depute E. F. to execute the within process. Dated — day of —, 18—.

C. P. R., *U. S. Marshal.*

322. *Return of Marshal on Attachment and Monition.*

(2 Abb. U. S. Pr. 373.)

[*Indorsed on the writ.*]

In obedience to the within monition, I attached the [ship] W., therein described, on the — day of —, 18—, and have given due notice to all persons claiming the same, that this court will, on the — day of —, 18—, [if that day should be a day of jurisdiction, if not, on the next day of jurisdiction thereafter,] proceed to the trial and condemnation thereof, should no claim be interposed for the same. (a)

Dated this — day of —, 18—.

C. P. R., *U. S. Marshal.*

323. *Attachment in Rem, with Citation in Personam.*

(*Ante*, p. 1259-'60; 2 Abb. U. S. Pr. 373.)

[Eastern] District of [Virginia], to wit:

The President of the United States of America,

To the Marshal of the [Eastern] District of [Virginia], Greeting:

[Seal of court.] Whereas a libel *in rem* and *in personam* hath been filed in the District Court of the United States for the [Eastern] District of [Virginia], on the — day of —, in the year of our Lord eighteen hundred and —, by A. B., against the [ship] W., her tackle, &c., and against the freight due for the cargo now or lately laden therein [according to the tenor of the libel], and against U. V., [master of the said ship] for the reasons and causes in the said libel mentioned, and praying the usual process and monition of the said court in that behalf to be made, and that the said [master] and all persons interested in the said vessel, her tackle, &c., may be cited in general and special, to answer the premises, and all proceedings being had, that the said vessel, her tackle, &c., may, for the said causes in the said libel mentioned, be condemned and sold to pay the demands of the libellant:

You are, therefore, hereby commanded to attach the said vessel, her tackle, &c., and to detain the same in your custody, until the further order of the court respecting the same, and to give due notice to all persons claiming the same, or knowing or having anything to say, why the same should not be condemned and

sold pursuant to the prayer of the said libel, that they be and appear before the said court, to be held in and for the [Eastern] District of [Virginia], at the —, in the city of —, on the — day of —, 18—, at eleven o'clock in the forenoon of the same day, if the same shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations in that behalf. And we do hereby further empower, and strictly command and charge you, the said marshal, that you cite and admonish the said respondent, if he shall be found within the jurisdiction of this court, that he be and appear before the said district court, on the — day of —, 18—, at the United States court rooms in the city of —, then and there to answer the said libel, and to make his allegations in that behalf; and have you then there this writ, with your return thereon.

Witness, &c. [Teste, as at the close of Form 321.]

W. G. R., *Proctor for Libellant.*

J. R. P., *Clerk.*

[Indorsement as in Form 321.]

### 324. *Return of Marshal on Attachment and Citation.*

(2 Abb. U. S. Pr. 374.)

[The same as in Form 322, to (a), and then add]: And I have cited the defendant, U. V., within named, [and the defendant, Y. Z., is not found within this district, after due and diligent search.]

Dated this — day of —, 18—.

G. P. R., *U. S. Marshal.*

### 325. *Citation in Personam.*

(*Ante*, p. 1259-'60; 2 Abb. U. S. Pr. 374.)

[Eastern] District of [Virginia], to wit:

The President of the United States of America,

To the Marshal of the [Eastern] District of [Virginia], Greeting:

Whereas a libel has been filed in the District Court of the [Seal of court.] United States for the [Eastern] District of [Virginia], on the — day of —, in the year of our Lord eighteen and —, by A. B., against Y. Z., in a certain action, civil and maritime, for [wages] therein alleged to [be due to] the said libellant, amounting to — dollars, [a] and praying that a citation may issue against the said respondent, pursuant to the rules and practice of this court:

You are, therefore, hereby commanded to cite and admonish the said respondent, if he shall be found within the jurisdiction of the said court, that he be and appear before the said district court, on the — day of —, 18—, at [the United States court-rooms] in the city of —, then and there to answer the said libel, and to make his allegations in that behalf; (b) and have you then there this writ, with your return thereon. [Teste, as at close of Form 321.]

J. W. S., *Proctor for Libellant.*

### 326. *Citation in Personam, with a Clause of Attachment, if not Found.*

(2 Abb. U. S. Pr. 374.)

[Proceed as in Form 325, to (b), and continue]: and if the said respondent cannot be found, that you attach his goods and chattels to the amount of — dol-

lars, in the said libel sued for; and if such property cannot be found, that you attach his credits and effects to the said amount, in the hands of D. E., garnishee; and that you cite and admonish the said garnishee, that he be and appear before the said district court at the time and place aforesaid, and there answer on oath or solemn affirmation as to the debts, credits or effects of the said respondent in his hands, and to such interrogatories touching the same as may be propounded by the libellant; and that you have then there this writ, with your return thereon. [Teste, as at close of Form 321.]

### 327. Warrant of Arrest in Personam.

(Ante, p. 1259-'60; 2 Abb. U. S. Pr. 375.)

[Proceed as in Form 325, to (a), and continue]: and praying that a warrant of arrest may issue against the said defendant:

You are therefore hereby commanded to take and arrest the said defendant, if he shall be found in your district, and him safely keep, so that you may have his body before the said district court on the — day of —, 18—, at [the United States court-rooms] in the city of —, then and there to answer the said libel, and to make his allegations in that behalf; and have you then there this writ, with your return thereon. [Teste, as at close of Form 321.]

[Mark for Bail.]

The marshal will hold the defendant to bail in the sum of — dollars. Dated this — day of —, 18—.

J. R. P., Clerk.

### 328. Bond to Marshal on Arrest of Defendant.

(Ante, p. 1259-'60; 2 Abb. U. S. Pr. 375.)

Know all men by these presents, that we, D. D., S. S. and R. R., are held and firmly bound unto C. P. R., marshal of the [Eastern] District of [Virginia], in the sum of — dollars, lawful money of the United States, to be paid to the said C. P. R., his executors, administrator or assigns; to which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, our and each of our heirs, executors and administrators, firmly by these presents. Sealed with our seals this — day of —, in the year 18—.

Whereas a libel has been filed in the District Court of the United States, for the [Eastern] District of [Virginia], on the — day of —, 18—, by A. B., against the above-bounden D. D., in a certain action, civil and maritime, for [seaman's wages] therein alleged to be due and owing to the said libellant, amounting to — dollars: Now the condition of the above obligation is, that if the above-bounden D. D. shall appear in the said suit before the said district court, on the — day of —, 18—, at the [United States court-rooms], in the city of —, and abide by all orders of the said court, interlocutory or final, in the cause, and pay the money awarded by the final decree rendered therein, in the said court, or in any appellate court, then the above obligation to be void, otherwise to remain in full force and virtue.

Sealed and delivered in the presence of

G. G.  
H. H.

D. D. [SEAL.]  
S. S. [SEAL.]  
R. R. [SEAL.]

329. *Bond to Marshal, to discharge Vessel Attached.*

(3 Abb. U. S. Pr. 375.)

District Court of the United States of America,

For the [Eastern] District of [Virginia]:

Filed the — day of —, 18—.

Know all men by these presents, that we, D. D., S. S. and R. R., are held and firmly bound unto C. P. R., marshal of the United States for the [Eastern] District of [Virginia], in the sum of — dollars, to be paid to the said C. P. R., his executors, administrators or assigns; for the payment of which well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated the — day of —, in the year of our Lord eighteen hundred and —.

Whereas a libel has been filed in the District Court of the United States for the [Eastern] District of [Virginia], on the — day of —, in the year of our Lord eighteen hundred and —, by A. B., libellant against the [ship] W., for the sum of — dollars, on which process of attachment has issued, and the said [ship] is in custody of the said marshal, under the said attachment, and the said D. D. has applied for a discharge of the said [ship] from the custody of the marshal, and has filed a claim to the said [ship] as owner thereof, and has filed a stipulation for the said claimant's costs, pursuant to the rules and practice of the said court: Now, therefore, the condition of the above obligation is such, that if the above-bounden D. D. shall abide by and perform the decrees, interlocutory or final, in the cause, in this court, or in any appellate court, then the above obligation shall be void, otherwise the same shall be, and remain in full force and virtue.

Sealed and delivered in the presence of

G. G.

H. H.

D. D. [SEAL.]

S. S. [SEAL.]

R. R. [SEAL.]

*Justification of Sureties.*

[The same as in Form 320.]

*Certificate of Approval.*

I approve of the sufficiency of the sureties to the within bond. Dated this — day of —, 18—.

Recorded the — day of —, 18—.

(Signed,) J. J., Judge, [or Collector of Port.]

330. *Order entering Appearance, on giving Foregoing Bond.*

(2 Abb. U. S. Pr. 376, 276.)

At a stated [or *special*] term of the District Court of the United States of America for the [Eastern] District of [Virginia], held at the [United States court-rooms], in the city of —, on the — day of —, in the year of our Lord eighteen hundred and —:

Present, the Honorable R. W. H., District Judge.

A. B.	}	.....	Libellant.
vs.		Upon a libel against the [ship] W.	
D. D.		.....	Claimant.

On filing claim, and stipulation for claimant's costs, together with a bond under the act of Congress, in double the amount claimed by the libellant, approved by the district judge, on motion of R. K. B., proctor for the claimant, it is ordered that the appearance of the claimant be, and the same is hereby entered, and that a copy of this order be delivered to the marshal.

### 331. *Notice for Publication of Contents and Purpose of Libel.*

(2 Abb. U. S. Pr. 376.)

United States of America, }  
[Eastern] District of [Virginia], } to wit:

Whereas a libel hath been filed in the District Court of the United States of America, for the [Eastern] District of [Virginia], on the — day of —, in the year of our Lord eighteen hundred and —, by A. B., against the [ship] W., her tackle, &c. ;

And whereas the substance of the said libel is, that [*insert a brief statement of the allegations of the libel*]; And praying that the said vessel, her tackle, &c., may be condemned, and sold to pay the demand of the libellant: Now, therefore, in pursuance of the monition, under the seal of the said court, to me directed and delivered, I do hereby give public notice to all persons claiming the said vessel, her tackle, &c., or in any manner interested therein, that they be and appear before the said district court, to be held at the United States court rooms in the city of —, in and for the said district, on the — day of —, 18—, at — o'clock of that day, provided the same shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose their claims, and to make their allegations in that behalf. Dated this — day of —, 18—.

D. S., *Proctor for Libellant.*

C. P. H., *U. S. Marshal.*

### 332. *Order on Return of Process in Rem, for a Default, and Reference to a Commissioner.*

(*Ante*, p. 1261, 1262; 2 Abb. U. S. Pr. 377.)

[*Caption and title of the cause, as in Form 330.*]

The marshal having returned on the monition issued to him in the above-entitled cause, that in obedience thereto he has attached the said [ship] W., her tackle, apparel, furniture and cargo, and has given due notice to all persons claiming the same, that the court would on this day, at — o'clock, proceed to the trial and condemnation thereof, should no claim be interposed therefor, which return has been filed, and the usual proclamation having been made, and no person having appeared or interposed a claim to the said [ship] W., her tackle, &c., [*as above*]:

Now, on motion of C. T. B., proctor for the libellant, Ordered that the defaults of all persons be, and the same are hereby entered herein, and that the said vessel, her tackle, &c., be condemned to pay the demand of the libellant;

(*b*) And on like motion, it is further Ordered, that it be referred to a commissioner of this court to ascertain and compute the amount due the libellant for [seaman's wages], and to report thereon to this court with all convenient speed.



333. *Order on Return of Process, where Claim is Filed.*

(2 Abb. U. S. Pr. 377.)

[Caption and title of the cause, as in Form 330.]

The marshal having returned upon the monition [in this cause, that he had attached the said vessel, her tackle, &c., and had given due notice to all persons claiming the same, that this court would on this day proceed to the trial and condemnation thereof, should no claim be interposed for the same, and the usual proclamation having been made, and D. D. having appeared and filed his claim to the said vessel, her tackle, &c., as owner, [or *duly authorized agent of Y. Z., the owner,*] and having been allowed — days to file his answer herein :

Now, on motion of C. T. B., proctor for the libellant, Ordered that default *nisi* of the said claimant be entered, and that the defaults of all others be entered herein.

334. *Order on Return of Process in Personam, for Default, and Reference to a Commissioner.*

(2 Abb. U. S. Pr. 378.)

[Caption and title of the cause, as in Form 330.]

The process in this cause, being returned personally served, the defendant is duly called and does not appear; and on motion of C. T. B., proctor for the libellant, the said defendant is pronounced to be in contumacy and default, and the libel is adjudged to be taken *pro-confesso* against him, and is referred to G. H., a commissioner, to ascertain the amount due to the libellant, and to report the same to the court with all convenient speed.

335. *Claim to Property Interposed.*

(2 Abb. U. S. Pr. 378; Ben. Adm. 501, 505-'6; Ante, p. 1264.)

[Caption and title of the cause, as in Form 330.]

And now D. D., owner [or *duly authorized agent of Y. Z., owner,*] of the [ship] W., intervening for the interest of himself [or of the said Y. Z.,] in the said [ship] W., appears before this honorable court and makes claim to the said [ship] W., her tackle, &c., as the same are attached by the marshal, under process of this court, at the instance of A. B., and the said D. D. avers that he [or the said Y. Z., owner,] was in possession of the said [ship] at the time of the attachment thereof, and that the person above named is the true and *bona fide* owner of the said [ship], and that no other person is the owner thereof; wherefore he prays to defend accordingly.

Y. Z.

Sworn to and subscribed this — day of —, 18—, before me,

G. H., *U. S. Commissioner.*G. D. S., *Proctor for Claimant.*336. *Stipulation for Costs, to be Given by the Claimant.*

(2 Abb. 378; Ben. Adm. 504.)

District Court of the United States,

For the [Eastern] District of [Virginia]:

Filed the — day of —, 18—.

STIPULATION ENTERED INTO PURSUANT TO THE RULES AND PRACTICE OF THIS COURT.

Whereas a libel was filed in this court on the — day of —, in the year of our

Lord eighteen hundred and —, by A. B., against (a) the [ship] W., her tackle, apparel, furniture, and cargo, for the reasons and causes in the said (b) libel mentioned, and praying that the same may be condemned and sold, (c) to answer the prayer of the libellant ;

And whereas, also, (d) a claim has been filed in said cause by D. D., and the said claimant, and S. S., surety, (e) the parties hereto hereby consenting, that in case of default or contumacy on the part of the claimant or his surety, a summary decree may be entered against them, and each of them, and that execution thereon for the sum of two hundred and fifty dollars may issue against their goods, chattels and lands :

Now it is hereby stipulated and agreed, for the benefit of whom it may concern, that the undersigned stipulators shall be and are hereby bound in the sum of two hundred and fifty dollars, conditioned that the claimant above named shall pay all costs and expenses (f) which shall be awarded against him by the final decree of this court, or upon an appeal by the appellate court.

D. D.  
S. S.

Taken and acknowledged this — day of —, 18—, before me.

J. R. P., Clerk.

### *Justification of Security.*

[The same as in Form 320.]

### *337. The Like Stipulation by Defendant.*

(2 Abb. U. S. Pr. 379.)

[Pursue Form 336 to (a), and then say] : against Y. Z., for the reasons and causes in the said libel mentioned ; and whereas the said Y. Z. has appeared in said suit, and the said Y. Z. and S. S., his surety, [continue as in Form 336, from (e) to the end,] the parties hereto, &c., [substituting the defendant for claimant.]

### *338. The Like Stipulation, by Intervenor.*

(2 Abb. U. S. Pr. 379)

[Proceed as in Form 336, substituting intervenor for claimant.] [Insert at (d), in place of what follows in that Form to (e).] Y. Z. has intervened for his interest, and the said Y. Z. and S. S., his surety, [insert at (f),] and damages.

### *339. Affidavit to obtain Interlocutory Sale.*

District Court of the United States,

For the [Eastern] District of [Virginia] :

A. B.	}	-----	Libellant,
vs.		Upon a libel against the [ship] W.	
D. D.	}	-----	Claimant.

A. B., the libellant in this cause, being duly sworn, says that [insert a brief statement of the facts, showing a sale to be proper ; e. g., the ship W. is now at the wharf in the port of —, subject to large and increasing expense for wharfage, keeper's fee, and other charges ; that she is in a damaged condition, and requires

care and repairs; that a large portion of her cargo is perishable, being sugar, and in a wet and damaged state; that the only claim that has been interposed is of D. D., for, &c.] that, in the affiant's opinion, the interests of all parties concerned will be promoted by a speedy judicial sale of said [ship, her tackle, apparel, furniture, and cargo], the proceeds of such sale to be brought into court for the benefit of whom it may concern, subject to the further order of the court.

A. B.

Sworn to before me, this — day of —, 18—.

J. R. P., *Clerk.*340. *Notice of Monition for Interlocutory Sale.*

(Ante, p. 1260; 2 Abb. U. S. Pr. 380; Ben. Adm. 508.)

[Title of Cause as in Form 339.]

You are hereby notified, that on the libel and claim in this cause, and on the affidavit of A. B., a copy of which is hereto annexed, a motion will be made before his honor, R. W. H., judge of this court, at [the United States court-room,] in the city of —, on the — day of —, 18—, at — o'clock in the forenoon of that day, for an order that the [ship W., and her tackle, &c., and cargo above mentioned], be sold under the direction of the marshal, and the proceeds brought into court, to abide the event of this suit.

D. S., *Proctor for Libellant.*To H. J. S., Esq., *Proctor for Claimant.*341. *Order for Interlocutory Sale of Ship and Cargo.*

(Ante, p. 1260; 2 Abb. U. S. Pr. 379; Ben. Adm. 509.)

[Caption and title of cause as in Form 330.]

On reading and filing the affidavit of A. B. [and the consent of R. K. B., proctor for the claimant,] and on motion of C. T. B., proctor for the libellant, It is ordered that the [ship] W., her tackle, apparel, furniture, and cargo be sold by the marshal, on [six] days' public notice, and that a writ of *venditioni exponas* issue accordingly; and it is further ordered, that the marshal bring the proceeds of such sale into this court, and pay the same to the clerk thereof.

342. *Writ of Venditioni Exponas.*

(2 Abb. U. S. Pr. 394; Ben. Adm. 509; Ante, p. 1238.)

[Eastern] District of [Virginia], to wit:

The President of the United States of America,

To the Marshal of the [Eastern] District of [Virginia], Greeting:

Whereas a libel was filed in the district court of the United States for the [Eastern] District of [Virginia], on the — day of —, in the year of our Lord eighteen hundred and —, by A. B., against the [ship] W., her tackle, apparel, furniture, and cargo, and praying that the same may be condemned and sold to answer the prayer of the said libellant: And whereas the said ship and cargo have been attached by the process issued out of the said district court, in pursuance of the said libel, and are now in custody by virtue thereof, and such proceedings have been thereupon had, that by the interlocutory sentence and decree of the said court, in this cause made and pronounced on the — day of —, in the year of our Lord eighteen hundred and

—, the said [ship], her tackle, apparel, furniture, and cargo, were ordered to be sold by you, the said marshal, after giving [six] days' notice of such sale, according to law; You are therefore hereby commanded to cause the said [ship] W., her tackle, apparel, furniture, and cargo to be sold, in manner and form, upon the notice, and at the time and place by law required, and that you have the moneys arising from such sale in said court, at the United States court-rooms in the city of —, on the — day of —, next, and that you then pay the same to the clerk of the court; and have you also then there this writ.

Witness, the Honorable R. W. H., judge of the said court, at the city of —, in the [Eastern] District of [Virginia], this — day of —, in the year of our Lord eighteen hundred and —, and of our independence the —.

J. R. P., Clerk.

### 343. *Order Appointing Appraisers, Preliminary to Delivery of Ship to claimant.*

(*Ante*, p. 1260; 2 Abb. U. S. Pr. 380.)

[*Caption and title of the cause, as in Form 330.*]

On motion of W. T. S., proctor for the libellant [or claimant,] It is ordered that E. E. and F. F. be, and they are hereby appointed appraisers to appraise the value of the above mentioned [ship], her tackle, apparel, furniture and cargo, proceeded against herein. And it is further ordered, that the clerk of this court give notice of the appointment of the said E. E. and F. F. as such appraisers.

### 344. *Consent that a Vessel be Discharged on Stipulation.*

(2 Abb. U. S. Pr. 382.)

[*Title of the cause, as in Form 339.*]

The [ship] W., having been arrested upon the process issued in this cause, we consent that on filing the usual stipulation to be entered into according to the rules of the court, to appear, abide and perform the decree of the court, in the sum of — dollars, and on filing a claim, and on complying with the rules of the court as to the fees of the officers of court, the said [ship] be discharged from custody and arrest. Dated this — day of —, 18—.

R. H. T., Proctor for Libellant.

### 345. *Stipulation for Value of the Ship.*

District Court of the United States,

For the [Eastern] District of [Virginia]:

In Admiralty.

Filed the — day of —, 18—.

STIPULATION FOR VALUE ENTERED INTO PURSUANT TO THE RULES AND PRACTICE OF THIS COURT.

Whereas a libel was filed on the — day of —, in the year of our Lord eighteen hundred and —, by A. B., against the [ship] W., her tackle, apparel, furniture and cargo, for the reasons and causes in the said libel mentioned; And whereas the said vessel, her tackle, apparel, furniture and cargo, are now in the custody of the marshal, under the process issued in pursuance of the prayer of the said libel; And whereas a claim to said vessel has been filed by D. D., and the

value thereof has been appraised [or *fixed by consent*], at ——— dollars, as appears from the said appraisement [or *consent*], now on file in the said court; Now, therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that the undersigned, stipulators, shall be and are hereby bound jointly and severally, the said D. D. as principal, and the said S. S. and R. R. as sureties, in the sum of ——— dollars, lawful money of the United States, hereby consenting and agreeing that a summary decree may be entered against us, and each of us, for the above [appraised] value, with interest thereon from this date, and that execution may thereon issue against our goods, chattels and lands for the payment of the said sum of money, if payment thereof, or any part thereof, shall be ordered or decreed. Upon condition nevertheless, that if the stipulators undersigned shall at any time, upon the interlocutory or final order or decree of the said court, or of any appellate court, to which the above suit may proceed, and upon notice of such order or decree, to R. H. T., esquire, proctor for the said claimant of said vessel, &c., abide by and pay the money awarded by the final decree rendered by the said court, or the appellate court, if any appeal intervene, then this stipulation to be void, otherwise to remain in full force and virtue.

D. D.

S. S.

R. R.

Taken and acknowledged this — day of —, 18—, before me.

G. H., *U. S. Commissioner.*

### *Justification of Sureties.*

[*The same as in Form 320.*]

### 346. *Notice to the Marshal to Discharge.*

(2 Abb. U. S. Pr. 383.)

[*Title of the cause, as in Form 339.*]

Sir,—The above named vessel, &c., having been bonded, and the costs of the clerk, amounting to — dollars, having been paid, and all other required conditions having been complied with, you will discharge the said vessel, her tackle, &c., from your custody.

Yours, &c.,

To C. P. R., *United States Marshal.*

J. B. P., *Clerk.*

### 347. *Exceptions to Libel.*

(*Ante*, p. 1266; 2 Abb. U. S. Pr. 388.)

[*Title of the cause, as in Form 339.*]

The exception of Y. Z. [the defendant] to the libel of A. B., libellant, filed in the above cause:

First exception. For that [*here state in what the libel is insufficient, as e. g.—the same does not allege that the libellant has sustained any damage in the matter of the libel.*]

Second exception. For that, &c. [*Proceed in like manner to set forth the other exceptions.*]

In all which particulars the said libel is imperfect and insufficient, and, therefore, the said [defendant] is not bound to answer the same; and he prays that the said libel may be dismissed with costs.

Dated this — day of —, 18—.

R. K. B., *Proctor for, &c.*

348. *Decree over-ruling Exceptions to Libel.*

[Caption with title of the cause, as in Form 330.]

This cause coming on to be heard on the exceptions to the libel herein filed by the [defendant], and having been argued by the advocates for the respective parties, and due deliberation having been had in the premises, it is now ordered, adjudged and decreed, (a) that the said exceptions to the libel aforesaid be disallowed and over-ruled, with costs to be taxed.

349. *Decree on Exceptions to Libel, Ordering Amendment of Libel, &c.*

[Proceed as in Form 348 to (a) and continue]: that an amended libel be filed herein, to which said exceptions shall be deemed applicable, and that the said exceptions be over-ruled, and that an answer be filed by the [defendant] within — days from the date hereof.

350. *Answer to Libel by Claimant.*

(Ante, p. 1267 ; 2 Abb. U. S. Pr. 384.)

[Title of the cause, as in Form 339.]

To the Honorable R. W. H., Judge of the District Court of the United States, in and for the [Eastern] District of [Virginia]:

D. D., claimant for the [ship] W., her tackle, apparel, furniture and cargo, intervening for his interest therein, for answer to the libel, and complaint of A. B. against the said [ship], her tackle, &c., alleges as follows:

First, [Here set forth the first averment relied on in the defence.]

Second, [Set forth the second averment, &c.]

[Proceed with the several averments, according to the case, admitting or denying, with or without qualification, each separate article of the libel, and each separate allegation therein, in the same order as numbered; and in like manner answer each interrogatory propounded.]

[Fifth], That all and singular the premises are true.

Wherefore the claimant prays that this honorable court will be pleased to pronounce against the libel herein, and that the same may be dismissed, with costs to these claimants to be taxed.

D. D., Claimant.

Sworn to before me this — day of —, 18—.

G. H., U. S. Commissioner.

R. K. B., Proctor for Claimant.

W. A. W., Advocate.

351. *Exceptions to Answer.*

(See 2 Abb. U. S. Pr. 384, 385.)

352. *Interrogatories Propounded to a Party.*

(Ante, p. 1267; 2 Abb. U. S. Pr. 385.)

[Title of the cause, as in Form 339.]

Interrogatories propounded to the defendant, [or libellant], which he is required to answer in writing under oath.

First interrogatory. What is your name, age and occupation, and where do you reside?

Second interrogatory. What do you know, &c., [and so throughout.]

Dated this — day of —, 18—.

C. T. B., Proctor for, &c.

[When the interrogatories are annexed to a pleading, proceed immediately after the jurat and signatures to the pleading, as in the foregoing Form, omitting the title of the cause, thus]: Interrogatories propounded, &c.

353. *Order for Commission or Dedimus Potestatem to take Depositions.*

(Ante, p. 1280-'81; 2 Abb. U. S. Pr. 386.)

[Caption and title of the cause, as in Form 330.]

On reading and filing a consent of the proctors of the several claimants in this cause, and on motion of C. T. B., proctor for the libellant, Ordered that a commission issue therein to G. H., of —, directing him to examine E. F., upon interrogatories to said commission annexed.

354. *Dedimus Potestatem.*

The President of the United States of America,

To [naming each commissioner], Greeting:

Know ye, that we, confiding in your prudence and fidelity, have appointed you commissioners, and by these presents do give you [or any two or more of you,] full power and authority diligently to examine, upon his [or their respective] corporal oath or affirmation, before you to be taken, E. F. [and F. G.] as witnesses on the part of the libellant, [or claimant, &c.,] in a certain cause now pending and undetermined in the district court for the [Eastern] District of [Virginia], in admiralty, wherein A. B. is libellant, and D. D. [claimant], touching the premises [or if interrogatories are annexed, on the interrogatories hereunto annexed.]

And we do further empower you [or any two or more of you,] to examine, on the same behalf, and in like manner, any other person or persons who may be produced before you; And we do hereby require you [and any two or more of you], before whom such testimony shall be taken, to reduce the same to writing, and to close it up under your hand and seal, directed to J. R. P., Clerk, &c. [giving the address in full,] and that you return the same when executed as above directed annexed to this writ, with the title of the cause endorsed on the envelope of the commission, into the said district court, before the judge thereof, with all convenient speed.

Witness, &c. [as in Form 321,]

J. R. P., Clerk.

H. R. T., Proctor for Libellant.

355. *Letters Rogatory to a Foreign Judge or Tribunal.*

(Ante, p. 1281-'82; 2 Abb. U. S. Pr. 388.)

The President of the United States of America,

To any Judge or Tribunal having Jurisdiction of Civil Causes

at [Havana in the Island of Cuba.]

Whereas a certain suit in admiralty is pending in our district court of the United States for the [Eastern] District of [Virginia], in which A. B. is libellant, and D. D. is claimant of the [ship] W., her tackle, apparel, furniture, and cargo, and it has been suggested to us that there are witnesses residing within your jurisdiction without whose testimony justice cannot be completely done between the said parties. We therefore request you that, in furtherance of justice, you will, by the usual and proper process of your court, cause such witness or witnesses as shall be named or pointed out to you by the said parties, or either of them, to appear before you, or some competent person by you to be appointed or authorized, at a precise time by you to be fixed, and there to answer on their oaths or affirmations to the several interrogatories hereto annexed, and that you will cause their depositions to be committed to writing, and return unto us under cover, duly closed and sealed up, together with these presents.

And we shall be ready and willing to do the same for you in a similar case when required.

Witness, &amp;c. [as at close of Form 321.]

J. R. P., Clerk.

O. A. T., Proctor for Libellant.

N. S. T., Proctor for Claimant.

356. *Affidavit to Obtain Summons, for Seaman's Wages.*

(Ante, p. 1272-'73; 2 Abb. U. S. Pr. 397; Ben. Adm. 559.)

[Prepare a bill of particulars in manner following]:

The ship W., Captain R. S., and owners,

To A. B., Dr.

To wages as [cook] from — day of —, 18—, to

— day of —, 18—, at \$—, per month, . . . \$—

CREDIT.

By two months' advance, . . . \$—

By cash in Liverpool, . . . —

By cash in Halifax, . . . —

By hospital money, — months, . . . —

Balance due, . . . \$—

United States of America, }

[Eastern] District of [Virginia,] } to wit:

A. B., late mariner on board the [ship] W., being duly sworn, says: That in the month of —, 18—, he shipped on board the said vessel, whereof R. S. was and still is master, then lying in the port of —, as [cook,] at the wages of — dollars a month, to perform a voyage to one or more ports in the Mediterranean, and back to some port in the United States, and signed the usual shipping articles for said voyage, which are retained by the said master; that the affiant performed said voyage, and in all respects did his duty as such [cook] till the arri-



val of the said vessel in the port of —, where, without cause, he was turned ashore from said vessel by the said master, and prevented from performing the remainder of the voyage; that he returned to the United States as passenger in another vessel, and the said vessel, W., arrived at the port of — on the — day of — instant, where she now is; And that there is now due to him for his wages on said voyage a balance of — dollars, as shown by the above schedule, which is just and true, which balance the said master has refused to pay.

A. B.

Sworn to before me this — day of —, 18—.

G. H., U. S. Commissioner,  
[or Justice of the Peace, or District Judge.]

### 357. *Preliminary Summons for Seaman's Wages.*

(*Ante*, p. 1272-'78; 2 Abb. U. S. Pr. 397; Ben. Adm. 560.)

To the Master and Owners of the [ship] W.:

I, G. H., U. S. Commissioner, do hereby summon you to appear to be and appear before me, at my office [No. —, — street,] in the city of —, on the — day of —, 18—, at — o'clock in the — noon of that day, then and there to show cause, if any you have, why process of attachment should not issue from the district court of this district against the [ship] W., her tackle, apparel, and furniture, according to the course of admiralty courts, to answer the claim of A. B., for mariner's wages.

Given under my hand this — day of —, in the year of our Lord eighteen hundred and —.

G. H. U. S. Commissioner.

F. D. B., *Proctor*.

### 358. *Affidavit of Service of Summons, for Seaman's Wages.*

(2 Abb. U. S. Pr. 398; Ben. Adm. 561.)

[Indorsed on the summons,]

[Eastern] District of [Virginia], to wit:

E. F., being duly sworn, says: That on the — day of — instant, he served a copy of the within summons upon the master [and owner] of the [ship] W., by delivering the same to R. S., the said master, [and Y. Z., owner aforesaid,] in person [or by leaving the same on board the [ship] W., with the persons in charge thereof, the master being absent, or by fastening the same in a conspicuous place on the mast of said vessel, no person being on board in charge thereof.]

E. F.

Sworn to this — day of —, 18—, before me.

G. H., U. S. Commissioner.

### 359. *Certificate of Commissioner, &c., after Summons, for Seaman's Wages.*

(*Ante*, p. 1272-'78; 2 Abb. U. S. Pr. 398; Ben. Adm. 561.)

I hereby certify to the clerk of the district court for the [Eastern] District of [Virginia], that there is sufficient cause of complaint whereon to found admiralty process against the [ship] W., her tackle, apparel, and furniture, to answer for the wages of A. B.

Dated this — day of —, 18—.

G. H., U. S. Commissioner.

360. *Examination in Preparatorio, in Prize Causes.*

(*Ante*, p. 1275-'76; Ben. Adm. 673.)

The "standing interrogatories" upon which the witnesses are examined in prize-causes, are given in full in Ben. Adm. 673, 680. They occupy too much space to be inserted here.

361. *Depositions of Witnesses in Preparatorio, in Prize Causes.*

(*Ante*, p. 1275 & seq; Ben. Adm. 680.)

District Court for the [Eastern] District of [Virginia]:

The examination and depositions of witnesses *in preparatorio*, touching the capture and seizure of the [ship] F. F., and the goods and merchandize on board of her, made by the privateer schooner of war, M., E. R., commander.

To the first interrogatory, J. L., the deponent, says: That, &c., [*and so on through the interrogatories.*] J. L.

Sworn to before me this ——— day of ———, 18—.

G. H., *U. S. Commissioner.*

362. *Depositions de bene esse.—Affidavit of Necessity.*

See *Ante*, p. 1280-'81; Ben. Adm. 511.

363. *Depositions de bene esse.—Notice of Taking of Depositions.*

See *Ante*, p. 1280-'81; Ben. Adm. 512.

364. *Depositions de bene esse.—Proof of Service of Notice.*

See Ben. Adm. 513.

365. *Depositions de bene esse.—Subpœna to Testify.*

See Ben. Adm. 513.

366. *Depositions de bene esse.—Deposition.*

See Ben. Adm. 514.

367. *Depositions de bene esse.—Certificate of Commissioner.*

See Ben. Adm. 519.

368. *Depositions de bene esse.—Order to open Depositions in Court.*

See Ben. Adm. 520.

369. *Decree Interlocutory in Rem.—Default.*

*Ante*, p. 1283-'84; 2 Abb. U. S. Pr. 390.

[*Caption and title of cause as in Form 330.*]

This cause being called in its order on the calendar, C. T. B., proctor for the libellant, reads and files notice of hearing, and admission [or *affidavit*] of service, and moves the hearing of the cause.

The proctor for the claimant not appearing, on like motion of C. T. B., proctor for libellant,—

It is ordered that the default of the said claimant, in not appearing, be, and the same is hereby entered, and that the said vessel, her tackle, &c., be condemned to pay the demands of the libellant;

And on like motion, it is further ordered [*as in Form 332, from (b) to the end*].

370. *Decree Final, dismissing a Libel.*

(Ante, p. 1285; 2 Abb. U. S. Pr. 390.)

[Caption and title of cause as in Form 330.]

This cause having been brought on for hearing, and the advocates of the respective parties being heard, and due deliberation being had, on motion of R. K. B., proctor for the defendant, Y. Z., it is ordered, adjudged, and decreed, that the libel filed in this cause be dismissed.

371. *Decree Final, for Defendant in a Possessory and Petitory Suit.*

(Ante, p. 1256-57; 2 Abb. U. S. Pr. 390.)

[Caption and title of cause as in Form 330.]

This cause having been heard on the pleadings and proofs, and argued by the advocates of the respective parties, and due deliberation being had in the premises, and it appearing to the court that the claimant has made out a sufficient and valid title to the said vessel, it is now ordered, adjudged, and decreed by the court, that the libel filed in this cause be dismissed, with costs to be taxed against the libellant. And on motion of the proctor for the claimant, it is further ordered that, unless an appeal be taken to this decree within the time limited and prescribed by the rules of this court, the claimant's stipulations be cancelled.

372. *Final Decree for a Sum Certain, with Costs.*

(2 Abb. U. S. Pr. 390.)

[Caption and title of cause as in Form 330.]

This cause having been heard on the pleadings and proofs, and having been argued by the advocates for the respective parties, and due deliberation being had in the premises, it is now ordered, adjudged, and decreed by the court, that the defendant pay to the libellant the sum of — dollars, with his costs to be taxed.

373. *Decree on the Merits, with Reference to a Commissioner.*

(Ante, p. 1284; 2 Abb. U. S. Pr. 391.)

[Caption and title of the cause as in Form 330.]

This cause having been heard on the pleadings and proofs, and having been argued by the advocates of the respective parties, and due deliberation being had, it is now ordered, adjudged, and decreed that the libellant recover against the [defendant] the amount due by the charter-party [or as the case may be,] mentioned in the libel in this cause, and that it be referred to a commissioner to ascertain the amount so due, after making all proper allowances, and that he report the same to this court with all convenient speed.

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